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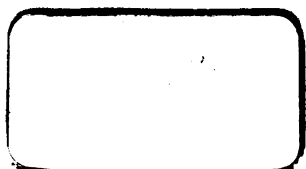
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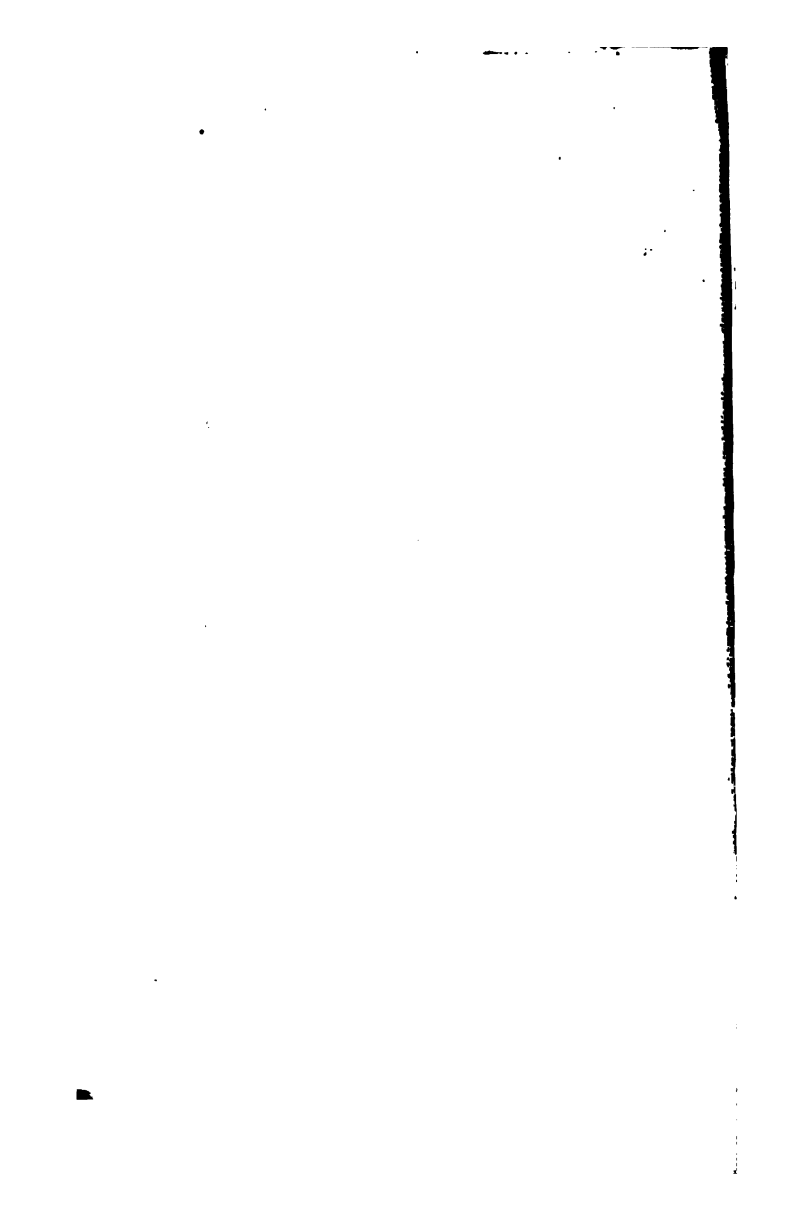
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California Laws
THE
PENAL CODE

OF
CALIFORNIA.

ENACTED IN 1872 ; AS AMENDED IN 1881.

ANNOTATED BY

ROBERT DESTY,

Author of "A Compendium of American Criminal Law,"
"Federal Procedure," etc.

SAN FRANCISCO:
SUMNER WHITNEY & CO.
1881.

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PREFACE.

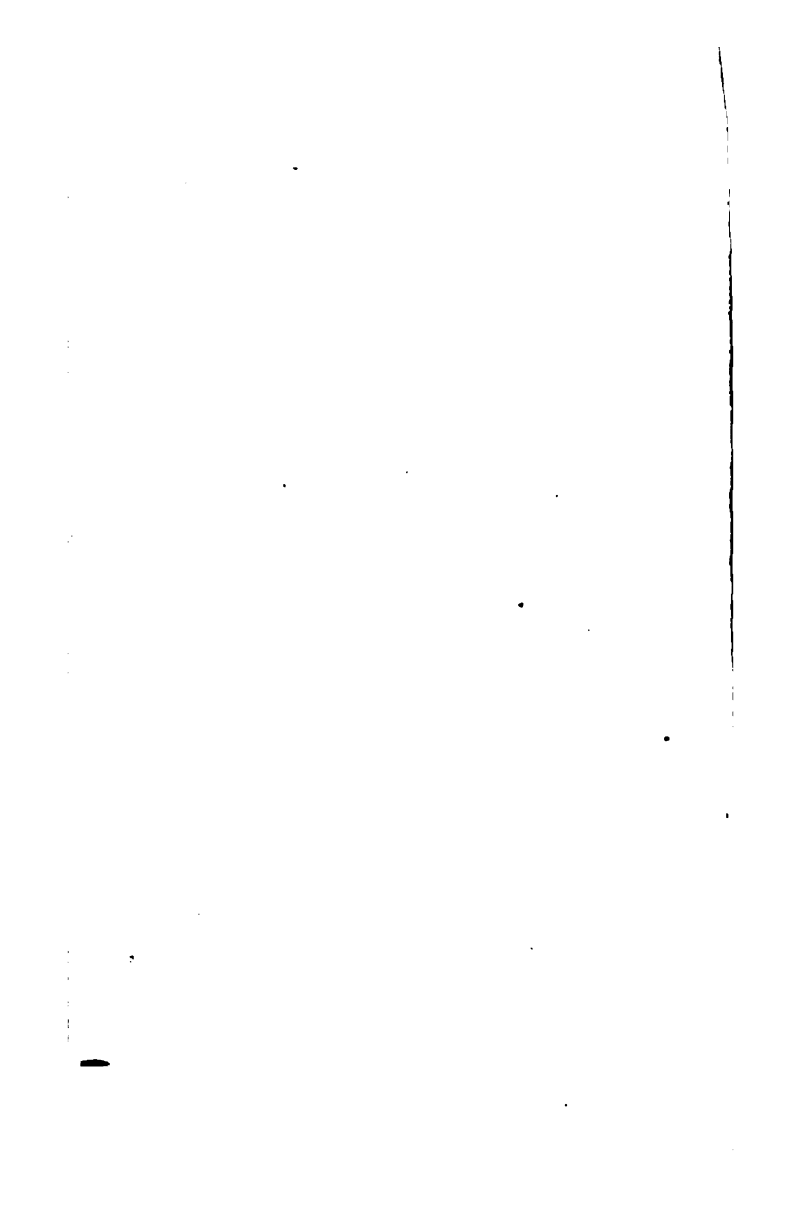
THIS edition of the Penal Code contains all the amendments made thereto up to the termination of the regular session of the Legislature of 1881. The date of approval of each amendment is given at the end of the section amended, the word "approved" indicating that the amendatory act took effect at the statutory time, sixty days after passage, while the words "in effect" indicate that the act took effect "from and after its passage."

All the decisions of the Supreme Court of this State, as well as numerous decisions of foreign courts of last resort, bearing upon the subjects treated, have been added as notes to the text, given in as terse a form as possible, having regard to the point decided and its application. Numerous cross-references will be found throughout the volume, to facilitate the comparison of cognate sections, and render the necessity of an appeal to the index less frequent.

The general statutes relating to subjects embraced in the Penal Code are given in the appendix, and those parts of the Code of Procedure relating to juries and evidence, as prepared by Mr. Newmark, are bound in for convenience of reference. The whole is submitted to the profession, with a view to aid practitioners in this interesting branch of the law.

ROBERT DESTY.

MAY 2nd, 1881.



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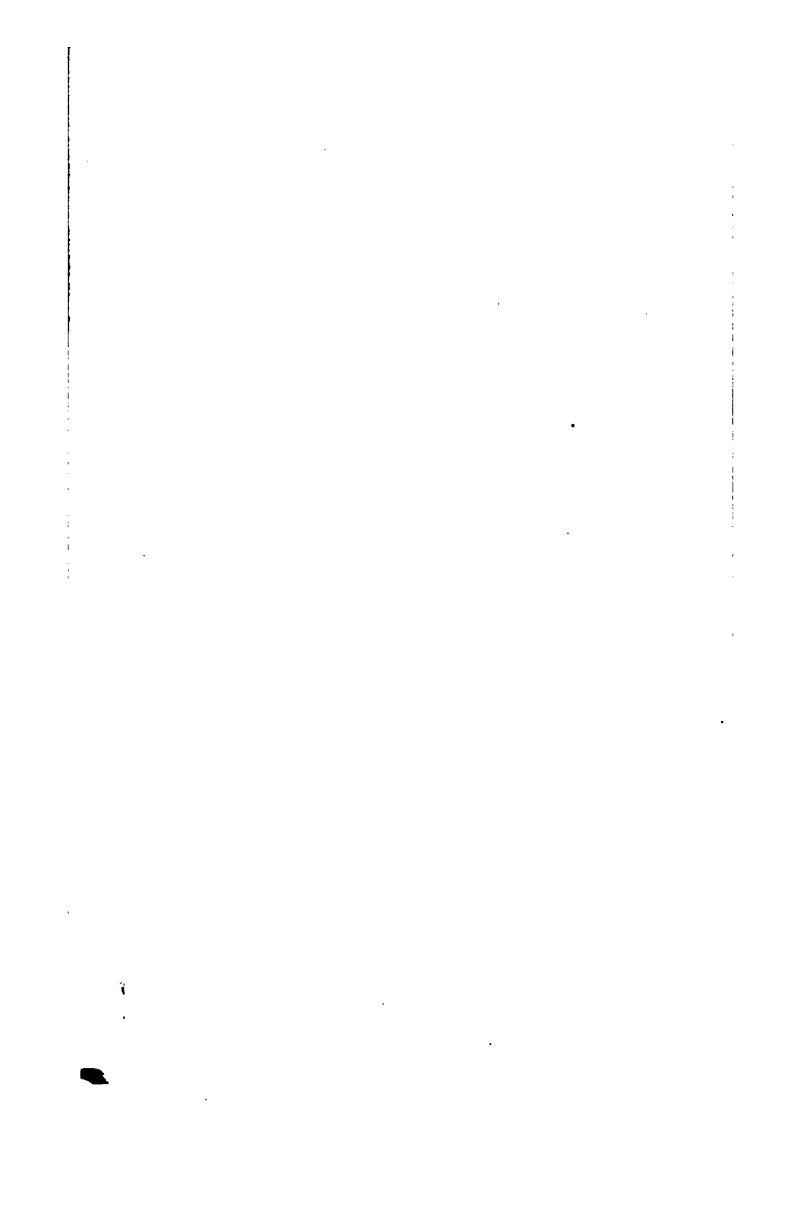
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CONSTITUTIONAL PROVISIONS.

Art. I, § 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

Inalienable rights.—Legislative power cannot reach them except on conviction of crime—8 Neb. 37; and no person can be deprived of his liberty without intervention of a jury—1 Stockt. Ch. 181; but every person may be restricted from exercising his rights in a manner so as to interfere with the rights of others—38 Cal. 704.

Art. I, § 4. * * * No person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief.

Testimony may be received without respect to religious belief of witness—17 Cal. 612. The rule applied to dying declarations of deceased—51 Cal. 599; 43 id. 34.

Art. I, § 5. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension.

See Const. U. S. art. I, § 9, subd. 2.

Art. I, § 6. All persons shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned.

Bail—right to.—A prisoner may be admitted to bail after indictment found—19 Ala. 561; charge and indictment distinguished—44 Cal. 557; "proof" and "presumption" apply to the guilt, not to the grade of the offense—2 Pittsb. Rep. 362. The right is secured to those only who

have not been convicted—41 Cal. 29; *Ex parte Watkins*, 7 Peters, 568; as where jury fail to agree, and are discharged—41 Cal. 220; 59 Mo. 598; nor does it apply to capital cases in which bail may be made a matter of discretion, or may be forbidden—19 Cal. 539; 19 Ala. 561; 23 Id. 89; 34 Id. 270; 9 Ark. 222; as where the evidence would not sustain a verdict of murder in the first degree—34 Ala. 270; 2 Ashm. 227; 19 Ohio, 139.

Bail after conviction.—Pending appeal, admission to bail is in discretion of court—48 Cal. 3; Id. 553; 41 Id. 30; a discretion measured by legal rules, and by reference to analogies of the law—48 Cal. 5; 49 Id. 690. Statutes, making bail a matter of discretion, are constitutional—41 Cal. 29. The discretion will be exercised whenever substantial justice may be promoted—44 Cal. 555.

Who may release on bail.—To procure release on bail, the prisoner must go before the magistrate who issued the warrant, or some magistrate in the same county—54 Cal. 102; and after conviction, the judge of the court in which the trial was had—48 Cal. 553; 49 Id. 690; and then, only under extraordinary circumstances—49 Cal. 68; 54 Id. 35. On an application by *habeas corpus*, the defendant must state facts to sustain the exercise of an intelligent discretion—41 Cal. 30. A release on bail is not imprisonment—41 Cal. 210.

Excessive bail, reduction of.—In fixing amount, the purpose should be to cause the appearance of accused—54 Cal. 75; and on the application for reduction, the guilt of accused will be presumed—54 Cal. 75; 44 Id. 555. The court or judge is not authorized to interfere, unless the bail is excessive, and greatly disproportionate to the offense—44 Cal. 555; 54 Cal. 75. Fifteen thousand dollars not excessive for assault to murder—44 Cal. 555; nor one hundred and twelve thousand dollars for ten distinct felonies—53 Cal. 410.

Art. I, § 7. The right of trial by jury shall be secured to all, and remain inviolate. * * * A trial by jury may be waived in all criminal cases not amounting to felony, by consent of both parties, expressed in open court.

Trial by jury.—The right is secured by the Constitution, 7 Peters, 552; in all common-law actions—19 Cal. 140. It extends only to prosecutions by indictment, or information—26 Ala. 165; it does not apply to proceedings on presentment before a justice of the peace, 12 Conn. 454, nor to summary remedies given by statute—7 Ga. 194; 26 Ala. 165; 42 Pa. St. 89; as the action of a police magistrate in committing a minor to the industrial school—51 Cal. 280. It is a right which cannot be waived by consent of defendant—18 N. Y. 129; 1 Pitts. 492. The Legislature may regulate the manner of trial—45 Iowa, 253; 43 Cal. 146. Aliens are not entitled to a jury composed of one-half aliens—51 Cal. 597.

Art. I, § 8. Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county.

Prosecution by indictment of any crime, including misdemeanors, is not prohibited—53 Cal. 412.

Exceptions to grand jury.—The law may provide that exceptions be taken at a particular time—15 Cal. 426; and if he declines to do so, he waives his right to do so after indictment—49 Cal. 650. It is competent for the Legislature to restrict the grounds of challenge—46 Cal. 146. As, to want of concurrence—46 Cal. 146; 54 id. 37; Wallace C. J. dis.; failure to insert names of witnesses, failure to be presented—46 Cal. 147; or for irregularity in selecting, summoning, or impanneling—46 id. 146; but that it was summoned by the coroner is not a ground for challenge to the panel—46 id. 154; 32 id. 68. See Code, § 995. That it was summoned as a petit jury and impaneled as a grand jury is illegal—45 Cal. 29. If accused is indicted under a wrong name, he may still be tried under his real name—6 Cal. 210.

Art. I, § 9. * * * Indictments found, or information laid, for publications in newspapers, shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause.

Art. I, § 13. In criminal prosecution in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses, in criminal cases, other than cases of homicide, where there is reason to believe that the witness, from inability or other cause, will not attend at the trial.

Right of accused.—Defendant has the right to confront and cross-examine witnesses—54 Cal. 527; but this right may be waived—33 Ala. 354.

Right to counsel.—In capital cases the court may allow more than two counsel to address the jury, on each side—48 Cal. 236. Order of argument—see 43 Cal. 154; id. 349; 44 id. 100; 46 id. 114; id. 302; 47 id. 105. By jail breaking and escaping, defendant waives his right to counsel—56 Cal. 298; 97 Mass. 543.

Jeopardy.—A person indicted for murder, after discharge of jury, on indictment for manslaughter, is twice in jeopardy—48 Cal. 334. If, while jury is out deliberating, the judge adjourns the term, it is an ac-

quittal—48 Cal. 329. It attaches when a party is once placed on trial before a competent court, on a valid indictment and a discharge of jury without legal consent—48 Cal. 326; 44 Id. 35; 33 Id. 479; 4 Id. 376; 5 Id. 278; 8 Blatchf. 526; 16 Conn. 54; 15 Ark. 261; 3 Brev. 421; 3 Cush. 212; 7 Ga. 422; 3 Hawks, 331; 2 Halst. 172; 17 Mass. 515; 8 Wend. 640; but it is otherwise where the jury is discharged from unavoidable necessity—9 Wheat. 579; 2 Sum. 19; Bald. 95; 1 McLean, 434; 6 Serg. & R. 577; as from their inability to agree—48 Cal. 326; 41 Id. 212; or where the action has been dismissed—54 Cal. 412; 52 Id. 463. The point of objection should be expressed on the record—48 Cal. 327; unless the verdict is so uncertain that judgment cannot be passed—53 Id. 690.

Defendant as witness.—This provision applies only to criminal cases—1 Abb. U. S. 317; 1 Sawy. 605; 10 Int. Rev. Rec. 107. "Criminal case" means one involving punishment for crime—3 Ch. L. N. 57; 21 Int. Rev. Rec. 251; or charge for official misconduct—1 Wood, 499. Defendant need not be a witness on his own behalf—36 Cal. 522; and his refusal to be so does not tend to establish his guilt—53 Id. 66; 36 Id. 522. But a question put to him on cross-examination, whether he had been previously arrested, is not objectionable—45 Cal. 148. That he offers himself as a witness on his own behalf does not change the rules of practice, nor make him a witness for the State—41 Cal. 431.

Art. I, § 16. No bill of attainder, *ex post facto* law, or law impairing the obligations of contracts, shall ever be passed.

Bill of attainder.—A bill of attainder is a legislative act which inflicts punishment without a judicial trial—4 Wall. 277.

Ex post facto.—These words relate exclusively to penal laws—3 Dall. 390; 8 Peters, 109; 17 How. 456; 4 Wall. 172; Id. 390; but not to criminal procedure—46 Cal. 114; 3 Gratt. 632; 16 B. Mon. 15; 14 Tex. 402. A law allowing counsel for the State to open and close the argument is not *ex post facto*—46 Cal. 116; nor is a statute providing that a second conviction for petit larceny makes one guilty of felony—45 Cal. 432; 43 Mass. 413; 3 Gratt. 738.

Art. I, § 20. * * * No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court.

Art. II, § 1. * * * No person convicted of any infamous crime, and no person hereafter convicted of the embezzlement or misappropriation of public money, shall ever exercise the privilege of an elector in this State.

Infamous crimes.—Larceny—1 Root, 485. Receiving stolen goods—7 Met. 500. Forgery—3 Ohio St. 229; 3 Hawks, 333. Perjury—3 Salk. 155; 4 East, 180; 11 Id. 307. Subornation of perjury—3 Gale & D. 141; 6 Jur. 669.

Art. IV, § 17. The Assembly shall have the sole power of impeachment, and all impeachments shall be tried by the Senate. When sitting for that purpose, the

senators shall be on oath or affirmation, and no person shall be convicted without the concurrence of two-thirds of the members elected.

Trial of impeachment.—To be effectual, articles must be presented to and be received by a quorum of the entire Senate—12 Fla. 653; and a member of the House voting thereon is qualified to sit on the trial, if subsequently elected to the Senate—Addison's Trial, 21-8; Porter's Trial, 53. All the functions of the governor are suspended during his trial—3 Neb. 464.

Art. IV, § 18. The governor, lieutenant governor, secretary of state, controller, treasurer, attorney-general, surveyor-general, chief justice and associate justices of the Supreme Court, and judges of the Superior Courts, shall be liable to impeachment for any misdemeanor in office, but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit under the State: but the party convicted or acquitted shall, nevertheless, be liable to indictment, trial, and punishment, according to law. All other civil officers shall be tried for misdemeanor in office in such manner as the legislature may provide.

Misdemeanor in office.—Trial of civil officers—45 Cal. 200. A presiding judge may be impeached for preventing an associate from delivering his opinion—Addison's Trial, 114; 4 Dall. 225; Porter's Trial, 61. A removal from office is part of the judgment—1 Leg. Gaz. 455; 43 Ala. 224.

Art. IV, § 21. No person convicted of the embezzlement or defalcation of the public funds of the United States, or of any State, or of any county or municipality therein, shall ever be eligible to any office of honor, trust, or profit under this State, and the Legislature shall provide, by law, for the punishment of embezzlement or defalcation as a felony.

Art. VI, § 1. The judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, Superior Courts, justices of the peace, and such inferior courts as the Legislature may establish in any incorporated city or town, or city and county.

Branches of judiciary.—Each branch has its functions, and each is beyond the control of the other—5 Cal. 43; id. 239; and the Legislature cannot confer on one court the functions of another—5 id. 230; but see 30 id. 580. The only case is where the court cannot afford the relief sought—8 Cal. 26; id. 34; id. 520; 9 id. 607; but two or more courts may have concurrent jurisdiction over same parties and subject-matter—30 id. 580. The judgment of court which first acquires jurisdiction cannot be interfered with—21 Cal. 438.

Inferior courts.—The Municipal Criminal Court of San Francisco is a constitutional court—39 Cal. 517; 41 id. 129; 52 id. 220.

Justices of peace.—Their jurisdiction is exclusive as to misdemeanors, where no indictment is found—53 Cal. 412. They may punish for contempt—47 Cal. 131. They are inferior courts, in favor of whose jurisdiction nothing can be assumed—55 Cal. 217; 12 Cal. 283; 23 Cal. 401; 33 Cal. 318; 34 Cal. 321.

City Criminal Court of San Francisco.—Is a court of record—52 Cal. 222.

Police Court of San Francisco.—Intendments in favor of its judgments in certain cases—43 Cal. 457. It possesses the same powers and jurisdiction as is or may be conferred by law upon justices of the peace—47 Cal. 127. It is an inferior court, and everything should appear in its proceedings to give it jurisdiction and justify its judgment—5 Cranch, 174; 55 Cal. 216; *criticising*—45 Cal. 455. Jurisdictional facts must be set forth on the records—34 Cal. 321.

Art. VI, § 4. The Supreme Court shall have appellate jurisdiction * * * in all criminal cases prosecuted by indictment or information, in a court of record, on questions of law alone. * * * Each of the justices shall have power to issue writs of *habeas corpus* to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or the Supreme Court, or before any Superior Court in the State, or before any judge thereof.

Appellate jurisdiction.—The Supreme Court has no jurisdiction in criminal cases of a less degree than felony—5 Cal. 295; 7 id. 140; id. 166; 9 id. 85; 16 id. 187; 20 id. 117; 29 id. 459; 30 id. 98; 31 id. 565; 53 id. 427. It has no jurisdiction in a criminal case involving validity of a tax—30 Cal. 98. It has jurisdiction on appeal on questions of law alone—55 Cal. 185.

Habeas corpus.—52 Cal. 220.

Art. VI, § 5. The Superior Courts shall have original jurisdiction * * * in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for. * * * They shall have appellate jurisdiction in such cases arising in justices' and other inferior courts, in their respective counties, as may be prescribed by law. * * * Said courts, and their judges, shall have power to

issue writs of *habeas corpus*, on petition by, or on behalf of any person in actual custody, in their respective counties.

Original jurisdiction.—District Courts (Superior Courts) have jurisdiction of actions to prevent extortion—45 Cal. 200. They have jurisdiction to order accused to answer a criminal charge—51 Cal. 376; and whether such order is erroneous or irregular, cannot be considered on *habeas corpus*—id.; 35 id. 100; 52 id. 220. Superior Courts, as successors of District Courts, can enforce the judgment rendered by the latter courts—54 Cal. 184. See Const. Cal. art. xxii, § 3. They have jurisdiction on *habeas corpus*, and all process necessary to enforcement of their judgments after affirmation on appeal—54 Cal. 344; 43 id. 457. A judge in one district may hold court in another district—1 Cal. 380; 2 id. 107.

County Courts (Superior Courts) are courts of general criminal jurisdiction—27 Cal. 65. This section confers appellate jurisdiction on Superior Courts, when mode and means of appeal are provided—41 Cal. 129. The jurisdiction of County Courts extends to inquiries by intervention of grand juries—53 Cal. 412.

Adjournment.—By the Act of March 1st, 1864, a district judge may adjourn a general term in one county over an intervening term in another county; and the Act of 1863, p. 333, was intended to prevent the loss of a term, if the judge did not appear on the day appointed—42 Cal. 20.

Art. VI, § 19. Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

Instructions.—Court may instruct jury that testimony tends to prove the matter—49 Cal. 560; may state evidence and declare law, but not express opinion on weight of evidence—17 id. 166; 18 id. 376; 22 id. 213; 24 id. 605; 27 id. 509; 34 id. 663; 36 id. 255. It should not instruct on controverted facts—51 Cal. 588; or charge that the existence of a fact raises a presumption of existence of another fact—51 Cal. 603; 52 id. 315; 54 id. 63; 51 id. 589.

Art. XX, § 2. Any citizen of this State who shall, after the adoption of this Constitution, fight a duel with deadly weapons, or send or accept a challenge to fight a duel with deadly weapons, either within this State or out of it, or who shall act as second, or knowingly aid or assist in any manner those thus offending, shall not be allowed to hold any office of profit, or to enjoy the right of suffrage under this Constitution.

Disfranchisement is not a cruel personal punishment within the inhibition of the Constitution—3 Smith, Pa. 112. See 23 Ind. 393.

Art. XX, § 10. Every person shall be disqualified from holding any office of profit in this State who shall have been convicted of having given or offered a bribe to procure his election or appointment.



AN ACT TO ESTABLISH A PENAL CODE.

[Approved February 14th, 1872.]

*The People of the State of California, represented in Senate
and Assembly, do enact as follows:*

TITLE OF THE ACT.

1. This Act shall be known as THE PENAL CODE OF CALIFORNIA, and is divided into Three Parts, as follows:

- I—OF CRIMES AND PUNISHMENTS.
- II—OF CRIMINAL PROCEDURE.
- III—OF THE STATE PRISON AND COUNTY JAILS.

PRELIMINARY PROVISIONS.

- § 2. When this act takes effect.
- § 3. Not retroactive.
- § 4. Construction of the Penal Code.
- § 5. Provisions similar to existing laws, how construed.
- § 6. Effect of Code upon past offenses.
- § 7. Certain terms defined in the senses in which they are used in this Code.
- § 8. What intent to defraud is sufficient.
- § 9. Civil remedies preserved.
- § 10. Proceedings to impeach or remove officers and others preserved.
- § 11. Authority of courts-martial preserved. Courts of justice to punish for contempts.
- § 12. Of sections declaring crimes punishable. Duty of court.
- § 13. Punishments, how determined.
- § 14. Witness' testimony may be read against him on prosecution for perjury.
- § 15. "Crime" and "public offense" defined.
- § 16. Crimes, how divided.
- § 17. Felony and misdemeanor defined.
- § 18. Punishment of felony, when not otherwise prescribed.
- § 19. Punishment of misdemeanor, when not otherwise prescribed.
- § 20. To constitute crime there must be unity of act and intent.
- § 21. Intent, how manifested, and who considered of sound mind.
- § 22. Drunkenness no excuse for crime. When it may be considered.
- § 23. Certain statutes specified as continuing in force.
- § 24. This act, how cited.

2. This Code takes effect at twelve o'clock, noon, on the first day of January, eighteen hundred and seventy-three.

3. No part of it is retroactive, unless expressly so declared.

Construction.—The Code is not retrospective, unless so expressed—4 Cal. 136; 2 Wall. 328; 2 Cranch, 272; 1d. 358; 3 1d. 399; 2 Gall. 139; 1d. 204; 1 Bay. 179; 1 Blackf. 220; 4 Const. S. C. 384; 1 Ala. 226; 6 Johns. 101; 7 1d. 474; 3 Me. 326; 11 Mass. 396; 3 N. H. 473; 4 1d. 19; 6 1d. 109; 4 Serg. & R. 401; 13 1d. 256. It is competent in the Legislature to make a statute retroact—1 Cal. 65; 39 1d. 309. So, as to acts concerning appeals—28 Cal. 320.

4. The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice.

Common-law rule abrogated—45 Cal. 431; 49 Id. 70; 46 Id. 117.

Reasonable construction.—The reasonable sense designed by the Legislature must be applied—8 How. 41; 7 Peters, 164; 3 Wash. C. C. 209; 4 Denio, 235; 1 Ired. 121; 2 Leigh, 741; 2 Md. 310; 32 Me. 369; 2 McCord, 483; 8 Mass. 107; 4 Pick. 233; 15 Wend. 147; 3 Serg. & R. 207; 2 Va. Cas. 228.

5. The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.

6. No act or omission commenced after twelve o'clock, noon, of the day on which this Code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this Code, or by some of the statutes which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted under such statutes, and in force when this Code takes effect. Any act or omission commenced prior to that time may be inquired of, prosecuted, and punished in the same manner as if this Code had not been passed.

Effect on past offenses.—Where, by subsequent statute, the punishment is increased, it is *ex post facto*, and inoperative—Const. U. S. art. 1, § 10, subd. 1; 46 Cal. 117; 3 Dall. 386; 6 Cranch, 87, 138; otherwise, where punishment is diminished—22 N. Y. 95; 21 Pick. 492; 3 Chand. 109; 1 Blackf. 193; 7 Tex. 69. Increased punishment for a subsequent offense may be imposed—45 Cal. 430; 47 Id. 113; see Desty's Crim. Law, § 46 d, p. 125; and this is not punishment for the first offense—People v. Stanley, 47 Cal. 114. If a statute is changed subsequent to commission of offense, the punishment is regulated by the prior law—7 Cal. 356; but statutes changing the forms of procedure are not *ex post facto* laws—46 Cal. 118. See EX POST FACTO, *ante*, Const. Provis.

7. Words used in this Code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word person includes a corporation as well

as a natural person; writing includes printing; oath includes affirmation or declaration; and every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one in the term "depose"; signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness. The following words, also, have in this Code the signification attached to them in this section, unless otherwise apparent from the context:

First. The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Second. The words "neglect," "negligence," "negligent," and "negligently," import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

Third. The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.

Fourth. The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

Fifth. The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this Code. It does not require any knowledge of the unlawfulness of such act or omission.

Sixth. The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or

undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion, in any public or official capacity.

Seventh. The word "vessel," when used with reference to shipping, includes ships of all kinds, steamboats, canal-boats, barges, and every structure adapted to be navigated from place to place for the transportation of merchandise or persons.

Eighth. The words "peace officer" signify any one of the officers mentioned in section eight hundred and seventeen of this Code.

Ninth. The word "magistrate" signifies any one of the officers mentioned in section eight hundred and eight of this Code.

Tenth. The word "property" includes both real and personal property.

Eleventh. The words "real property" are coextensive with lands, tenements, and hereditaments.

Twelfth. The words "personal property" include money, goods, chattels, things in action, and evidences of debt.

Thirteenth. The word "month" means a calendar month, unless otherwise expressed.

Fourteenth. The word "will" includes codicils.

Fifteenth. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a court or judicial officer, and the word "process" a writ or summons issued in the course of judicial proceedings.

Sixteenth. Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning.

Seventeenth. Words giving a joint authority to three or more public officers or other persons, are construed as

giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority.

Eighteenth. When the seal of a court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, or upon any substance attached to the paper capable of receiving a visible impression. The seal of a private person may be made in like manner, or by the scroll of a pen, or by writing the word "seal" against his name.

Nineteenth. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the Territories, and the words "United States" may include the District and Territories. [Approved March 30th, in effect July 1st, 1874.]

Subd. 1. Willfully means designedly, intentionally—37 Ala. 154; 9 Met. 268; yet it frequently signifies an evil intent without justifiable excuse—10 Ala. 928; 3 Eng. 451; 5 Whart. 427; 12 Ad. & E. 625.

Subd. 2. Acts of omission, as well as acts of commission, may be negligent—2 Blatchf. 528; 5 McLean, 242.

Criminal negligence is an unlawful act done carelessly or a lawful act done without due caution—7 Ga. 13; 4 Mason, 505; 11 Humph. 159; 3 B. Mon. 170; Anth. 208; or an omission of a legal duty—2 Blatchf. 528; 5 McLean, 242.

Subd. 4. Malice is ill-will against a person—34 Cal. 48; 36 id. 255. In its legal sense it is an unlawful act done intentionally, without just cause or excuse—34 Cal. 48; 36 id. 255; 3 Story, 7; 1 Sum. 394; 2 id. 586; 3 Mason, 102; 4 id. 115; 5 id. 192; 23 Mo. 287; 122 Mass. 19; 12 Fla. 117; 2 Rich. 179; 2 Dev. 425.

Subd. 6. Any valuable thing is a bribe—10 Iowa, 212.

Subd. 16. Construction of terms.—Resort must be had to the natural signification of the words—84 Ill. 626. Words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged—1 Wheat. 304; 27 N. Y. 400; and the peculiar sense in which a word is used is to be determined by the context—5 Peters, 1; 8 id. 591. The word person includes corporations—24 Ohio St. 611; 23 Ind. 362. See 126 Mass. 61; 74 N. Y. 302.

8. Whenever, by any of the provisions of this Code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever.

9. The omission to specify or affirm in this Code any liability to damages, penalty, forfeiture, or other remedy

imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.

10. The omission to specify or affirm in this Code any ground of forfeiture of a public office, or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose, or suspend any public officer or other person holding any trust, appointment, or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition, or suspension.

11. This Code does not affect any power conferred by law upon any court-martial, or other military authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal, or officer, to impose or inflict punishment for a contempt.

12. The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed.

13. Whenever in this Code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court authorized to pass sentence, within such limits as may be prescribed by this Code.

14. The various sections of this Code which declare that evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceeding, do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination.

15. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding

23. Nothing in this Code affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force, notwithstanding the provisions of the Codes, except so far as they have been repealed or affected by subsequent laws:

First. All acts incorporating or chartering municipal corporations, and acts amending or supplementing such acts.

Second. All acts consolidating cities and counties, and acts amending or supplementing such acts.

Third. All acts for funding the State debt, or any part thereof, and for issuing State bonds, and acts amending or supplementing such acts.

Fourth. All acts regulating and in relation to rhodeos.

Fifth. All acts in relation to judges of the plains.

Sixth. All acts creating or regulating boards of water commissioners and overseers in the several townships or counties of the State.

Seventh. All acts in relation to a branch State prison.

Eighth. An act for the more effectual prevention of cruelty to animals, approved March thirtieth, eighteen hundred and sixty-eight.

Ninth. An act for the suppression of Chinese houses of ill-fame, approved March thirty-first, eighteen hundred and sixty-six.

Tenth. An act relating to the Home of the Inebriate of San Francisco, and to prescribe the powers and duties of the board of managers and the officers thereof, approved April first, eighteen hundred and seventy.

Eleventh. An act concerning marks and brands in the county of Siskiyou, approved March twentieth, eighteen hundred and sixty-six.

Twelfth. An act to prevent the destruction of fish in the waters of Bolinas Bay, in Marin County, approved March thirty-first, eighteen hundred and sixty-six.

Thirteenth. An act concerning trout in Siskiyou County, approved April second, eighteen hundred and sixty-six.

Fourteenth. An act to prevent the destruction of fish in Napa River and Sonoma Creek, approved January twenty-ninth, eighteen hundred and sixty-eight.

Fifteenth. An act to prevent the destruction of fish and game in, upon, and around, the waters of Lake Merritt or Peralta, in the county of Alameda, approved March eighteenth, eighteen hundred and seventy.

Sixteenth. An act to regulate salmon fisheries in Eel River, in Humboldt County, approved April eighteenth, eighteen hundred and fifty-nine.

Seventeenth. An act for the better protection of stock-raisers in the counties of Fresno, Tulare, Monterey, and Mariposa, approved March twentieth, eighteen hundred and sixty-six.

Eighteenth. An act concerning oysters, approved April twenty-eighth, eighteen hundred and fifty-one.

Nineteenth. An act concerning oyster-beds, approved April second, eighteen hundred and sixty-six.

Twentieth. An act concerning gas companies, approved April fourth, eighteen hundred and seventy.

24. This act, whenever cited, enumerated, referred to, or amended, may be designated simply as THE PENAL CODE, adding, when necessary, the number of the section.

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PART I.

OF CRIMES AND PUNISHMENTS.

(§§ 26-000.)

[35]

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

TITLE I.

Of Persons liable to Punishment for Crime.

§ 26. Who are capable of committing crimes.

§ 27. Who are liable to punishment.

26. All persons are capable of committing crimes except those belonging to the following classes:

1. Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness;

2. Idiots;

3. Lunatics and insane persons;

4. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent;

5. Persons who committed the act charged without being conscious thereof;

6. Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence;

7. Married women (except for felonies) acting under the threats, command, or coercion of their husbands;

8. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to, and did believe their lives would be endangered if they refused. [Approved March 30th, in effect July 1st, 1874.]

Sabb. 1. Conclusive presumption of incapacity for crime of infants under seven years—3 Hill, 479; 13 Bush, 230; 14 Com. B. N. S. 435; Plow. 19. See Desty's Crim. Law, § 21.

Rebuttable presumption of incapacity of children between seven and fourteen—31 Ala. 323; 10 Allen, 398; 5 Halst. 163; 9 Humph. 175; 7 Jones, (N. C.) 61; 2 Tenn. 79; 41 Vt. 585; 13 Ired. 184; 13 Bush, 230; 1

Lead. C. C. 71; 4 Car. & P. 236; 1 Cox C. C. 260. Desty's Crim. Law, § 22 a.

Subd. 2. Idiocy, in what consists—24 Ind. 231; 14 Mass. 207; 8 Jones, (N. C.) 136; 2 Va. Cas. 132; 17 Ala. 434; 6 McLean, 121; 6 Parker Cr. R. 43; Desty's Crim. Law, § 24 a.

Subd. 3. Lunatics and insane persons—6 Cal. 543; 24 Id. 230; 38 Id. 456; 7 Met. 500; 1 Lead. C. C. 94; 31 Cal. 466. See Desty's Crim. Law, § 25, *et seq.*

Subd. 4. Ignorance, or mistake of fact, may relieve from responsibility for crime—2 McLean, 14; 2 Cush. 577; 9 W. Va. 559; unless caused by carelessness or negligence—1 Conn. 502; 2 Cush. 577; 7 Humph. 148; 24 Ind. 77; Id. 80; 2 McLean, 14; 7 Met. 500. See Desty's Crim. Law, § 35 a.

Subd. 6. Accident or misfortune, as an excuse for crime—89 Mass. 541; 80 Id. 592; 22 Ga. 479. See Desty's Crim. Law, § 30 a, b.

Subd. 7. Married women under coercion, not responsible for crime—11 Gray, 437; 97 Mass. 593; 103 Id. 71; 1 Leach, 348; 1 Car. & P. 116; Dears. & B. 553; 2 Lew. C. C. 229. See Desty's Crim. Law, § 16 a.

Subd. 8. Direct physical compulsion, exempts from punishment—2 Dall. 346; 4 Wash. C. C. 402; 8 Car. & P. 616; 7 Wall. 214; 9 W. Va. 358. But threats of future injury, or commands from any other than a husband, do not excuse—18 St. Trl. 391; 5 Car. & P. 133. See Desty's Crim. Law, § 32 b.

27. The following persons are liable to punishment under the laws of this State:

1. All persons who commit, in whole or in part, any crime within this State;

2. All who commit larceny or robbery out of this State, and bring to, or are found with the property stolen in, this State;

3. All who, being out of this State, cause or aid, advise or encourage, another person to commit a crime within this State, and are afterwards found therein.

Jurisdiction—9 Nev. 49; 2 Oreg. 115; and see cases cited in Desty's Crim. Law, § 55 a.

TITLE II.

Of Parties to Crime.

- § 30. Classification of parties to crime.
- § 31. Who are principals.
- § 32. Who are accessories.
- § 33. Punishment of accessories.

30. The parties to crimes are classified as:

1. Principals; and,
2. Accessories.

31. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

Principals, who are.—A principal is the perpetrator of the offense, or one who is actually present, aiding and abetting—5 Cal. 133; 10 Id. 68; 27 Id. 340; 48 Id. 24; 1 Brev. 385; 15 Ga. 346; 26 Ind. 495; 13 Ired. 114; 12 Ohio St. 214; 9 Pick. 496. See Desty's Crim. Law, § 36 a. *As principals in the second degree*—48 Cal. 24; *or accessories before the fact*—Id., explaining 40 Id. 129; Id. 141; 39 Id. 75; 32 Id. 164. See Desty's Crim. Law, § 40 a. *Instigation to crime*, Id. § 40 b; *or aiders and abettors at the fact*—48 Cal. 19; Id. 64; see Desty's Crim. Law, § 37 a; *or accomplices*—Id. § 36 a. *Confederates in a common design*, of which the offense is a part, are all principals—47 Ind. 568; 13 Mo. 382; 29 Id. 311; 9 Pick. 496; 12 Ohio St. 146. See Desty's Crim. Law, § 39 a. It is not necessary to prove that one of two conspirators struck the fatal blow—49 Cal. 170; nor is one guiltless because the one he kills was already mortally wounded—48 Id. 64. If one person urges, encourages, aids, or assists another to kill, the legal presumption is, that he intends to kill—6 Pac. Coast L. J. 681. The offense of the accessory before the fact is committed in the county where the substantive accessorial acts are consummated—27 Cal. 340; 13 Bush, 142; 114 Mass. 307; 57 How. Pr. 342; 1 Parker Cr. R. 246. See Desty's Crim. Law, § 40 c.

32. All persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor and protect the person charged with or convicted thereof, are accessories.

Accessories after the fact, who are—28 Cal. 404; 42 Ga. 321; 1 Swan, 333; 39 Miss. 702. What sufficient to create liability—see Desty's Crim. Law, § 44 a. Legal construction of liability—see id. § 44 a.

Guilty of a substantive crime—40 Cal. 599; 28 id. 404; 40 id. 129. See Desty's Crim. Law, § 45 a.

33. Except in cases where a different punishment is prescribed, an accessory is punishable by imprisonment in the State prison not exceeding five years, or in a county jail not exceeding two years, or by fine not exceeding five thousand dollars.

TITLE III.

Of Offenses against the Sovereignty of the State.

§ 37. Treason, who only can commit.

§ 38. Misprision of treason.

37. Treason against this State consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the State. The punishment of treason shall be death.

Treason against a State is an offense at common law—2 Arch. Cr. Pr. 893, and is so recognized in the Constitution of the United States—see Const. U. S. art. iv, § 2 (2).

Citizens of a State owe allegiance to such State—2 Cranch. 82; 2 Kent. 42. Even though they be alien residents—2 Dall. 370; 5 Wheat. 76. See Desty's Crim. Law, § 68 a.

Levying war, what constitutes—2 Burr. Tr. 401; 2 Dall. 86; id. 346; 1 id. 35; 4 Cranch, 75; 2 Wall. Jr. 129; 11 Johns. 549. See Desty's Crim. Law, § 68 b.

Adhering to enemies.—What it embraces—see Desty's Crim. Law, § 68 c.

Punishment for treason—see Desty's Crim. Law, § 68 a.

38. Misprision of treason is the knowledge and concealment of treason, without otherwise assenting to or participating in the crime. It is punishable by imprisonment in the State prison for a term not exceeding five years.

Misprision of treason, what constitutes—see Desty's Crim. Law, § 68 d.

TITLE IV.

Of Crimes against the Elective Franchise.

- § 41. Violation of election laws by certain officers a felony.
- § 42. Fraudulent registration a felony.
- § 43. Refusal to be sworn or to answer board of judges.
- § 44. Refusal to obey summons of board.
- § 45. Fraudulent voting.
- § 46. Attempting to vote without being qualified.
- § 47. Procuring illegal voting.
- § 48. Changing ballots or altering returns by election officers.
- § 49. Inspectors unfolding or marking tickets.
- § 50. Forging or altering returns.
- § 51. Adding to or subtracting from votes given.
- § 52. Persons aiding and abetting.
- § 53. Intimidating, corrupting, deceiving, or defrauding electors.
- § 54. Furnishing money for elections.
- § 55. Offers to procure offices for electors.
- § 56. Communicating such offer.
- § 57. Bribing members of legislative caucuses, etc.
- § 58. Preventing public meetings.
- § 59. Disturbance of public meetings.
- § 60. Betting on elections.
- § 61. Violation of election laws by persons not officers.
- § 62. Violation of election laws as to tickets.

41. Every person charged with the performance of any duty, under the provision of any law of this State relating to elections, who willfully neglects or refuses to perform it, or who, in his official capacity, knowingly and fraudulently acts in contravention or violation of any of the provisions of such laws, is, unless a different punishment for such acts or omissions is prescribed by this Code, punishable by fine not exceeding one thousand dollars, or by imprisonment in the State prison not exceeding five years, or by both.

Offenses by election officers—see Desty's Crim. Law, § 70 j.

42. Every person who willfully causes, procures, or allows himself to be registered in the great register of any county, knowing himself not to be entitled to such registration, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in the county jail or State prison not exceeding one year, or by both. In all cases where, on the trial of a person charged with any offense under the provisions of this section, it appears in evidence that the accused stands registered in the great register of any county, without being qualified for such registration, the court must order such registration to be canceled.

Fraudulent registration is a misdemeanor—8 Blatchf. 48. See Rev. Stat. U. S. § 5512.

43. Every person who, after being required by the board of judges at any election, refuses to be sworn, or, being sworn, refuses to answer any pertinent question, propounded by such board, touching the right of another to vote, is guilty of a misdemeanor. [Approved March 30th, in effect July 1st, 1874.]

44. Every person summoned to appear and testify before any board of registration, who willfully disobeys such summons, is guilty of a misdemeanor.

45. Every person not entitled to vote, who fraudulently votes, and every person who votes more than once at any one election, or knowingly hands in two or more tickets folded together, or changes any ballot after the same has been deposited in the ballot-box, or adds, or attempts to add, any ballot to those illegally polled at any election, either by fraudulently introducing the same into the ballot-box before or after the ballots therein have been counted; or adds to, or mixes with, or attempts to add to or mix with, the ballots lawfully polled, other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election; or carries away or destroys, or attempts to

carry away or destroy, any poll-lists, or ballots, or ballot-box, for the purpose of breaking up or invalidating such election, or willfully detains, mutilates or destroys any election returns, or in any manner so interferes with the officers holding such election or conducting such canvass, or with the voters lawfully exercising their rights of voting at such election, as to prevent such election or canvass from being fairly held and lawfully conducted, is guilty of a felony.

Right to vote, not dependent on citizenship—see Desty's Crim. Law, § 70 c.

State has exclusive power to regulate the right of suffrage—43 Cal. 43; 1 Hughes, 448; 11 Blatchf. 200; 53 Pa. St. 112; 1 McAr. 169.

Illegal voting—see Desty's Crim. Law, § 70 e.

Voting twice—see id. § 70 f. When a person is so drunk as not to be able to form an intent, he cannot be convicted—29 Cal. 678. The act must be done knowingly—id.

46. Every person not entitled to vote, who fraudulently attempts to vote, or who, being entitled to vote, attempts to vote more than once at any election, is guilty of a misdemeanor.

Attempts to defraud.—As by personating another who has lived, but is at the time dead—14 Low. Can. Rep. 435; Russ. & R. 324; Rex v. Craup, id. 327; and it is not necessary that the false personation should prove successful—12 Week. Rep. 310.

47. Every person who procures, aids, assists, counsels, or advises another to give or offer his vote at any election, knowing that the person is not qualified to vote, is guilty of a misdemeanor.

48. Every officer or clerk of election who aids in changing or destroying any poll-list, or in placing any ballots in the ballot-box, or taking any therefrom, or adds, or attempts to add, any ballots to those legally polled at such election, either by fraudulently introducing the same into the ballot-box before or after the ballots therein have been counted, or adds to or mixes with, or attempts to add to or mix with the ballots polled any other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election, or allows another to do so, when in his power to prevent

it, or carries away or destroys, or knowingly allows another to carry away or destroy any poll-list, ballot-box, or ballots lawfully polled, is punishable by imprisonment in the State prison for not less than two nor more than seven years.

49. Every inspector, judge, or clerk of an election, who, previous to putting the ballot of an elector in the ballot-box, attempts to find out any name on such ballot, or who opens or suffers the folded ballot of any elector which has been handed in to be opened or examined previous to putting the same into the ballot-box, or who makes or places any mark or device on any folded ballot with the view to ascertain the name of any person for whom the elector has voted, or who, without the consent of the elector, discloses the name of any person which such inspector, judge, or clerk has fraudulently or illegally discovered to have been voted for by such elector, is punishable by fine, not less than fifty nor more than five hundred dollars.

50. Every person who forges or counterfeits returns of an election purporting to have been held at a precinct, town, or ward where no election was in fact held, or willfully substitutes forged or counterfeit returns of election in the place of the true returns, for a precinct, town, or ward where an election was actually held, is punishable by imprisonment in the State prison for a term not less than two nor more than ten years.

Certificate.—Making a false certificate of the result of an election is a misdemeanor—2 Dill. 219; S. C. 19 Am. Law Reg. 737.

51. Every person who willfully adds to or subtracts from the votes actually cast at an election, in any returns, or who alters such returns, is punishable by imprisonment in the State prison for not less than one nor more than five years.

52. Every person who aids or abets in the commission of any of the offenses mentioned in the four preceding sec-

tions, is punishable by imprisonment in the county jail for the period of six months, or in the State prison not exceeding two years. [Approved March 30th, in effect July 1st, 1874.]

53. Every person who, by force, threats, menaces, bribery, or any corrupt means, either directly or indirectly, attempts to influence any elector in giving his vote, or to deter him from giving the same, or attempts by any means whatever to awe, restrain, hinder, or disturb any elector in the free exercise of the right of suffrage, or furnishes any elector wishing to vote, who cannot read, with a ticket, informing or giving such elector to understand that it contains a name written or printed thereon different from the name which is written or printed thereon, or defrauds any elector at any such election, by deceiving and causing such elector to vote for a different person for any office than he intended or desired to vote for; or who, being inspector, judge, or clerk of any election, while acting as such, induces, or attempts to induce, any elector, either by menace or reward, or promise thereof, to vote differently from what such elector intended or desired to vote, is guilty of a misdemeanor.

Corrupting electors—see Desty's Crim. Law, § 70 h.

Defrauding electors—see Desty's Crim. Law, § 70 j.

54. Every person who, with intent to promote the election of himself or any other person, either—

1. Furnishes entertainment at his expense to any meeting of electors previous to or during an election;

2. Pays for, procures, or engages to pay for any such entertainment;

3. Furnishes or engages to pay or deliver any money or property for the purpose of procuring the attendance of voters at the polls, or for the purpose of compensating any person for procuring attendance of voters at the polls, except for the conveyance of voters who are sick or infirm;

4. Furnishes or engages to pay or deliver any money

or property for any purpose intended to promote the election of any candidate, except for the expenses of holding and conducting public meetings for the discussion of public questions, and of printing and circulating ballots, handbills, and other papers, previous to such election;

—is guilty of a misdemeanor.

Refreshments.—Giving refreshments to voter, to influence his vote—2 Tyrw. 134; or furnishing liquors—17 Kan. 351.

Furnishing money, or property, to influence vote—see Desty's *Crim. Law*, § 70 h.

55. Every person who, being a candidate at any election, offers or agrees to appoint or procure the appointment of any particular person to office, as an inducement or consideration to any person to vote for, or procure or aid in procuring the election of such candidate, is guilty of a misdemeanor.

Giving promises of reward to procure votes—see Desty's *Crim. Law*, § 70 h.

56. Every person, not being a candidate, who communicates any offer, made in violation of the last section, to any person, with intent to induce him to vote for, or to procure or aid in procuring the election of the candidate making the offer, is guilty of a misdemeanor.

57. Every person who gives or offers a bribe to any officer or member of any legislative caucus, political convention, committee, primary election, or political gathering of any kind, held for the purpose of nominating candidates for offices of honor, trust, or profit, in this State, with intent to influence the person to whom such bribe is given or offered to be more favorable to one candidate than another, and every person, member of either of the bodies in this section mentioned, who receives or offers to receive any such bribe, is punishable by imprisonment in the State prison not less than one, nor more than fourteen years.

58. Every person who, by threats, intimidations, or unlawful violence, willfully hinders or prevents electors

from assembling in public meeting for the consideration of public questions, is guilty of a misdemeanor.

Threats and intimidation—see Desty's Crim. Law, § 71 l.

59. Every person who willfully disturbs or breaks up any public meeting of electors or others, lawfully being held for the purpose of considering public questions, is guilty of a misdemeanor.

Disturbing electors—see Desty's Crim. Law, § 71 l.

60. Every person who makes, offers, or accepts any bet or wager upon the result of any election, or upon the success or failure of any person or candidate, or upon the number of votes to be cast, either in the aggregate or for any particular candidate, or upon the vote to be cast by any person, is guilty of a misdemeanor.

Betting on elections.—On the result of an election, is indictable—2 Ind. 499; 11 Ala. 543; 4 B. Mon. 1; 1 Ohio St. 139; 2 Humph. 301; 5 id. 561; 9 Dana, 31; 1 Meigs, 199; but not after the election is over—4 Sneed, 437; 2 Ala. 340; or betting on an election out of the State—4 Ill. 529. Bets on several different results are one bet—5 Sneed, 652. A sale of property may be a bet—2 Ind. 499; 16 B. Mon. 325. Or the offer of a present on result of the election is a bet—13 Smedes & M. 456.

61. Every person who willfully violates any of the provisions of the laws of this State relating to elections is, unless a different punishment for such violation is prescribed by this Code, punishable by fine not exceeding one thousand dollars, or by imprisonment in the State prison not exceeding five years, or by both

62. Every person who prints any ticket not in conformity with section one thousand one hundred and ninety-one of the Political Code, or who circulates or gives to another any ticket, knowing at the time that such ticket does not conform to the provisions of section one thousand one hundred and ninety-one of the Political Code, is guilty of a misdemeanor. [Approved March 23rd, 1874.]

TITLE V.

Of Crimes by and against the Executive Power
of the State.

- § 65. Acting in a public capacity without having qualified.
- § 66. Acts of officers *de facto* not affected.
- § 67. Giving or offering bribes to executive officers.
- § 68. Asking or receiving bribes.
- § 69. Resisting officers.
- § 70. Extortion.
- § 71. Officers illegally interested in contracts.
- § 72. Presenting fraudulent bills or claims for allowance or payment.
- § 73. Buying appointments to office.
- § 74. Taking rewards for deputation.
- § 75. Exercising functions of office wrongfully.
- § 76. Refusal to surrender books, etc., to successor.
- § 77. Sections to apply to administrative and ministerial officers.

65. Every person who exercises any function of a public office without taking the oath of office, or without giving the required bond, is guilty of a misdemeanor. [Approved March 30th, in effect July 1st, 1874.]

66. The last section shall not be construed to affect the validity of acts done by a person exercising the functions of a public office in fact, where other persons than himself are interested in maintaining the validity of such acts.

67. Every person who gives or offers any bribe to any executive officer of this State, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the State prison not less than one nor more than fourteen years, and is disqualified from holding any office in this State.

Executive officers.—It is indictable to be concerned in bribing, or attempting to bribe, a cabinet minister—4 Burr. 2494; a commissioner of the revenue—2 Dall. 384; Whart. St. Tri. 139; a sheriff—14 Ala. 603; 6 Tex. Ct. App. 665; 1 Va. Cas. 138.

PEN. CODE—5.

The offer of a bribe is sufficient, without tender or production of the money—6 Pac. Coast L. J. 1021; 33 N. J. L. 102. See Desty's Crim. Law, § 71 b.

68. Every executive officer, or person elected or appointed to an executive office, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the State prison not less than one nor more than fourteen years; and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this State.

Accepting bribes.—An offer by an officer, to receive a bribe, is indictable—65 Ill. 58. See Desty's Crim. Law, § 71 c.

69. Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

Offense, construed.—The offense consists in any act which is designed to, and actually does, prevent or hinder the officer in the performance of his duty—17 Ill. 373; 40 Iowa, 169; 103 Mass. 443; 123 id. 420; 2 Parker Cr. R. 13; 3 Vt. 110; 52 N. H. 500; 2 Strob. 73; 108 Mass. 426; 39 Conn. 244; 15 Mo. 486; 12 Ala. 199. See Desty's Crim. Law, § 76 a.

70. Every executive or ministerial officer who knowingly asks or receives any emolument, gratuity, or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor. [Approved March 30th, in effect July 1st, 1874.]

Extortion at common law is the taking, by color of office, money or other thing of value that is not due—6 Cowen, 661; 3 Bush, 39. *Before it is due*—1 Pick. 279; 33 N. J. L. 142; 2 Sneed, 160; 1 Yerg. 261; 6 Cowen, 661; 1 Mont. 322; 55 Ala. 125; 1 Lea, (Tenn.) 271; 5 Sneed, 69; 3 Sawy. 473. *Or more than is due*—1 Yeates, 71. It is enough if any valuable thing is received—5 Blackf. 460. See Desty's Crim. Law, § 84 a.

A public officer only can be convicted of this offense—56 Ga. 385. See Desty's Crim. Law, § 84 b.

71. Every officer or person prohibited by the laws of this State from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the State prison not more than five years, and is forever disqualified from holding any office in this State.

72. Every person who, with intent to defraud, presents for allowance or for payment to any State board or officer, or to any county, town, city, ward, or village board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of felony.

73. Every person who gives or offers any gratuity or reward, in consideration that he or any other person shall be appointed to any public office, or shall be permitted to exercise or discharge the duties thereof, is guilty of a misdemeanor.

Buying appointments to office—3 Serg. & R. 338; 36 Wis. 213; 8 Cent. L. J. 495; 5 Hill, 27; 32 Vt. 526; 2 Va. Cas. 460; 2 Camp. 229; 11 Mod. 387; 3 Burr. 1335; 4 id. 2494. See Desty's Crim. Law, § 70 h.

74. Every public officer who, for any gratuity or reward, appoints another person to a public office, or permits another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding five thousand dollars, and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this State.

75. Every person who willfully and knowingly intrudes himself into any public office to which he has not been elected or appointed, and every person who, having been an executive officer, willfully exercises any of the functions of his office after his term has expired, and a successor has been elected or appointed and has qualified, is guilty of a misdemeanor.

76. Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or been legally removed from office, willfully and unlawfully withholds or detains from his successor, or other person entitled thereto, the records, papers, documents, or other writing appertaining or belonging to his office, or mutilates, destroys, or takes away the same, is punishable by imprisonment in the State prison not less than one nor more than ten years.

77. The various provisions of this chapter apply to administrative and ministerial officers, in the same manner as if they were mentioned therein.

TITLE VI.

Of Crimes against the Legislative Power.

- § 81. Preventing the meeting of the Legislature.
- § 82. Disturbing the Legislature while in session.
- § 83. Altering draft of bill or resolution.
- § 84. Altering enrolled copy of bill or resolution.
- § 85. Giving or offering bribes to members of the Legislature.
- § 86. Receiving bribes by members of the Legislature.
- § 87. Witnesses refusing to attend, etc., before the Legislature.
- § 88. Bribes by members of the Legislature.
- § 89. Lobbying.

81. Every person who willfully, and by force or fraud, prevents the Legislature of this State, or either of the houses composing it, or any of the members thereof, from meeting or organizing, is guilty of felony.

82. Every person who willfully disturbs the Legislature of this State, or either of the houses composing it, while in session, or who commits any disorderly conduct in the immediate view and presence of either house, tending to interrupt its proceedings or impair the respect due to its authority, is guilty of a misdemeanor.

Legislative bodies have inherent power to punish for contempt of their rules and orders—6 Wheat. 204; 7 id. 38; 1 McAr. 453; 1 Wood. & M. 440; 9 Johns. 395; 6 id. 337; 4 Pa. L. J. 220; 14 Gray, 226; 37 N. H. 450. See 1 Kent, 236; Cush. L. & P. of Legis. Assem. 533, 608, 625, 655; Desty's Crim. Law, § 73 d. And any insult, contumely, threat, or violence, or imputation of bribery, or corruption, is an act of contempt—6 Wheat. 204; 1 Wills. 299; 3 id. 188. But the power of the Legislature cannot extend beyond the session—6 Wheat. 204; 13 Md. 642.

83. Every person who fraudulently alters the draft of any bill or resolution which has been presented to either of the houses composing the Legislature, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or certified by the presiding officer of either house, in language different from that intended by such house, is guilty of felony.

84. Every person who fraudulently alters the enrolled copy of any bill or resolution which has been passed or adopted by the Legislature of this State, with intent to procure it to be approved by the governor, or certified by the secretary of state, or printed or published by the printer of the statutes, in language different from that in which it was passed or adopted by the Legislature, is guilty of felony.

85. Every person who gives or offers to give a bribe to any member of the Legislature, or to another person for him, or attempts by menace, deceit, suppression of truth, or any corrupt means, to influence a member in giving or withholding his vote, or in not attending the house or any committee of which he is a member, is punishable by imprisonment in the State prison not less than one nor more than ten years.

Giving bribe to legislative officers—Whart. Prec. 1012.

Offer of bribe.—It is as much a crime to offer a bribe as to take one—33 N. J. L. 102; 6 Pac. C. L. J. 1021. The offense is complete when the offer is made, although in a matter not in the power of the officer—33 N. J. L. 102. The attempt is sufficient, even though the offense be not consummated—65 Ill. 53; 36 Tex. 294. See 14 Ala. 603; 4 Burr. 2494; 2 Camp. 229; 2 Ld. Raym. 1377. And without tender or production of the money offered—6 Pac. C. L. J. 1021; 1 Va. Cas. 133. See Desty's Crim. Law, § 71 b.

86. Every member of either of the houses composing the Legislature of this State who asks, receives, or agrees to receive any bribe, upon any understanding that his official vote, opinion, judgment, or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or gives, or offers, or promises to give any official vote in consideration that another member of the Legislature shall give any such vote, either upon the same or another question, is punishable by imprisonment in the State prison not less than one nor more than fourteen years, and upon conviction thereof shall, in addition to said punishment, forfeit his office, be disfranchised,

and forever disqualified from holding any office or public trust. [In effect April 6th, 1880.]

Receiving bribe.—An offer by an officer to receive a bribe is indictable—65 Ill. 88. See Desty's Crim. Law, § 71 c.

Contracts for contingent compensation for obtaining legislation, or for use of personal, or any secret or sinister influence on legislators, or for services of log-rolling, are void, and the parties thereto are indictable for misdemeanor—16 How. 314; 37 Cal. 163; 6 Dana, 366; 27 Mich. 23; 54 Me. 220; 35 Mass. 472; 1 Alken. 264; 5 Watts & S. 315; 7 Watts, 132; 14 N. Y. 239; 18 Pick. 470; 8 Ala. 719; 2 Va. Cas. 460.

87. Every person who, being summoned to attend as witness before either house of the Legislature or any committee thereof, refuses or neglects, without lawful excuse, to attend pursuant to such summons; and every person who, being present before either house of the Legislature or any committee thereof, willfully refuses to be sworn, or to answer any material and proper question, or to produce, upon reasonable notice, any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor.

88. Every member of the Legislature convicted of any crime defined in this chapter, in addition to the punishment prescribed, forfeits his office, and is forever disqualified from holding any office in this State.

89. Every person who obtains, or seeks to obtain money or other thing of value from another person, upon a pretense, claim, or representation that he can or will improperly influence in any manner the action of any member of a legislative body in regard to any vote or legislative matter, is guilty of a felony. Upon the trial no person otherwise competent as a witness shall be excused from testifying as such concerning the offense charged, on the grounds that such testimony may criminate himself, or subject him to public infamy, but such testimony shall not afterward be used against him in any judicial proceeding, except for perjury in giving such testimony. [In effect April 6th, 1880.]

TITLE VII.

Of Crimes against Public Justice.

- CHAP. I. BRIBERY AND CORRUPTION.
II. RESCUE.
III. ESCAPES AND AIDING THEREIN.
IV. FORGING, STEALING, MUTILATING, AND FALSIFYING JUDICIAL AND PUBLIC RECORDS AND DOCUMENTS.
V. PERJURY AND SUBORNATION OF PERJURY.
VI. FALSIFYING EVIDENCE.
VII. OTHER OFFENSES AGAINST PUBLIC JUSTICE.
VIII. CONSPIRACY.

CHAPTER I.

BRIBERY AND CORRUPTION.

- § 92. Giving bribes to judges, jurors, referees, etc.
- § 93. Receiving bribes by judicial officers, jurors, etc.
- § 94. Extortion.
- § 95. Improper attempts to influence jurors, referees, etc.
- § 96. Misconduct of jurors, referees, etc.
- § 97. Justice or constable purchasing judgment.
- § 98. Officers convicted of, disfranchised.
- § 99. Superintendent of printing, interest in contracts, etc.
- § 100. Superintendent of printing, collusion in furnishing materials.

92. Every person who gives or offers to give a bribe to any judicial officer, juror, referee, arbitrator, or umpire, or to any person who may be authorized by law to hear or determine any question or controversy, with intent to influence his vote, opinion, or decision upon any matter or question which is or may be brought before him for decision, is punishable by imprisonment in the State prison not less than one nor more than ten years.

Bribery, what constitutes.—It is the giving or receiving of any valuable thing, in order that the receiver may be corruptly influenced thereby, in the discharge of some public duty—10 Iowa, 212. See Desty's Crim. Law, § 71 a. It must be in some suit, matter, or cause, pending or brought before him—2 Cal. 564; 14 Ala. 603.

Judicial officers.—The statute confines the offense to acting more favorably to one side than the other—2 Cal. 564.

Justices of the peace, or any judicial officer—14 Ala. 603; 20 Vt. 9.

Prosecuting attorneys—33 Ind. 189; 1 Va. Cas. 138; 14 Ala. 503; Conf.

Members of municipal board—33 N. J. L. 102.

Offering bribe.—The offer of a bribe is a crime—33 N. J. L. 102; even though the offense be not consummated—65 Ill. 53; 36 Tex. 294. See 14 Ala. 603; 4 Burr. 2494; 2 Camp. 229; 2 Ld. Raym. 1377; nor, although in a matter not in the power of the officer to consummate—33 N. J. L. 102; and no subsequent act of the officer will exculpate—7 Tex. Ct. App. 181. When a party knew that the one to whom he offered the bribe was under age, the offense is committed—2 Sawy. 481. A tender or production of the money is not necessary—6 Pac. C. L. J. 1021; 1 Va. Cas. 138. See Desty's Crim. Law, § 71 b.

93. Every judicial officer, juror, referee, arbitrator, or umpire, and every person authorized by law to hear or determine any question or controversy, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or decision upon any matter or question which is or may be brought before him for decision, shall be influenced thereby, is punishable by imprisonment in the State prison not less than one nor more than ten years.

Accepting bribe.—It is bribery to seek an undue reward to influence behavior in office—4 Bl. Com. 139; and an offer to receive a bribe is indictable—65 Ill. 88. To make a case of bribery actual value—54 Ind. 561; S. C. 2 Am. Cr. R. 23.

94. Every judicial officer who asks or receives any emolument, gratuity, or reward, or any promise thereof, except such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.

Extortion.—No fees can be exacted but those provided by law, sanctioned by the court, or permitted by ancient usage; and where no remuneration is provided, the officer must perform the duties without it—3 Sawy. 473; 1 Serg. & R. 504; 1 Up. Can. Q. B. 292; 16 Id. 183. See Desty's Crim. Law, § 84 a, b. It is an indictable offense. See Id. 85 a.

95. Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator, or umpire, or appointed a referee, in respect to his verdict in, or decision of any cause or proceeding, pending or about to be brought before him, either—

1. By means of any communication, oral or written, had with him except in the regular course of proceedings;

2. By means of any book, paper, or instrument exhibited, otherwise than in the regular course of proceedings;

3. By means of any threat, intimidation, persuasion, or entreaty; or,

4. By means of any promise, or assurance of any pecuniary or other advantage;

—is punishable by fine not exceeding five thousand dollars, or by imprisonment in the State prison not exceeding five years. [Approved March 30th, in effect July 1st, 1874.

Embracery is an attempt to corruptly influence a jury or juror—2 Bish. C. L. 6th ed. § 384; 2 Whart. C. L. 8th ed. § 1858. It is not a crime at common law—2 Nev. 268. A witness has no right to deliver a paper to a jury, without directions of the court—5 Cowen, 503.

96. Every juror, or person drawn or summoned as a juror, or chosen arbitrator or umpire, or appointed referee, who either—

1. Makes any promise or agreement to give a verdict or decision for or against any party; or,

2. Willfully and corruptly permits any communication to be made to him, or receives any book, paper, instrument or information relating to any cause or matter pending before him, except according to the regular course of proceedings;

—is punishable by fine not exceeding five thousand dollars, or by imprisonment in the State prison not exceeding five years. [Approved March 30th, in effect July 1st, 1874.]

97. Every justice of the peace or constable of the same township who purchases or is interested in the purchase of any judgment or part thereof on the docket of, or on any docket in possession of, such justice, is guilty of a misdemeanor.

98. Every officer convicted of any crime defined in this chapter, in addition to the punishment prescribed, forfeits his office, and is forever disqualified from holding any office in this State.

99. The superintendent of state printing shall not, during his continuance in office, have any interest, directly or indirectly, in any printing of any kind, or in any binding, engraving, or lithographing, or in a contract for furnishing paper or other printing-stock or material connected with the State printing; and any violation of these provisions shall subject him, on conviction before a court of competent jurisdiction, to imprisonment in the State prison for a term of not less than two years nor more than five years, and a fine of not less than one thousand

dollars nor more than three thousand dollars, or by both such fine and imprisonment. [In effect April 1st, 1878.]

100. If the said superintendent of state printing shall corruptly collude with any person or persons furnishing paper or materials, or bidding therefor, or with any other person or persons, or have any secret understanding with him or them, by himself or through others, to defraud the State, or by which the State shall be defrauded or made to sustain a loss, contrary to the true intent and meaning of this act, he shall, upon conviction thereof, in any court of competent jurisdiction, forfeit his office, and be subject to imprisonment in the State prison for a term of not less than two years, and to a fine of not less than one thousand dollars nor more than three thousand dollars, or both such fine and imprisonment. [In effect April 3rd, 1876.]

CHAPTER II.

RESCUES.

§ 101. Rescuing prisoners.

§ 102. Retaking goods from custody of officer.

101. Every person who rescues or attempts to rescue, or aids another person in rescuing or attempting to rescue, any prisoner from any prison, or from any officer or person having him in lawful custody, is punishable as follows:

1. If such prisoner was in custody upon a conviction of felony punishable with death: by imprisonment in the State prison not less than one nor more than fourteen years.

2. If such prisoner was in custody upon a conviction of any other felony: by imprisonment in the State prison not less than six months, nor more than five years.

3. If such prisoner was in custody upon a charge of felony: by a fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding two years.

4. If such prisoner was in custody otherwise than upon a charge or conviction of felony: by fine not exceeding five hundred dollars, and imprisonment in the county jail not exceeding six months.

Rescue is the violent delivery of a prisoner from lawful custody—21 Wend. 509; see 4 Bl. Com. 131; even though the prisoner takes no part in the violence—T. Charit. 13; see 119 Mass. 217. It must not be from accident, or to avert threatened danger—see 1 Russ. Cr. 9th ed. 394. The imprisonment must be *prima facie* justifiable—1 Dutch. 209; see 7 Conn. 732. There must be knowledge by the rescuer that the prisoner was under arrest—26 Md. 199. If unsuccessful, it may be indicted as an attempt—15 Me. 100.

102. Every person who willfully injures or destroys, or takes or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor.

PEN. CODE.—G.

CHAPTER III.**ESCAPES, AND AIDING THEREIN.**

- § 105. Escapes from State prison.
- § 106. Attempt to escape from State prison.
- § 107. Escapes from other than State prison.
- § 108. Officers suffering convicts to escape.
- § 109. Assisting prisoner to escape.
- § 110. Carrying into prison things useful to aid in an escape.
- § 111. Expense of trial for escape.

105. Every prisoner confined in the State prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the State prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison. [In effect April 16th, 1880.]

106. Every prisoner confined in the State prison for a term less than for life, who attempts to escape from such prison, is guilty of a felony, and, on conviction thereof, the term of imprisonment therefor shall commence from the time such convict would otherwise have been discharged from said prison. [In effect April 16th, 1880.]

107. Every prisoner confined in any other prison than the State prison, who escapes or attempts to escape therefrom, is guilty of a misdemeanor.

Escape, what constitutes—see Desty's Crim. Law, § 77 a.

Liability of party escaping—see Desty's Crim. Law, § 77 b.

Prison breach, construed—see Desty's Crim. Law, § 78 a.

108. Every keeper of a prison, sheriff, deputy sheriff, constable, or jailer, or person employed as a guard, who fraudulently contrives, procures, aids, connives at, or voluntarily permits the escape of any prisoner in custody, is punishable by imprisonment in the State prison not

exceeding ten years, and fine not exceeding ten thousand dollars.

Permitting escape, liability for—see Desty's Crim. Law, § 80 a.

109. Every person who willfully assists any prisoner confined in any prison, or in the lawful custody of any officer or person, to escape, or in an attempt to escape from such prison or custody, is punishable as provided in section one hundred and eight of this Code.

Liability of party aiding escape—see Desty's Crim. Law, § 79 a.

110. Every person who carries or sends into a prison anything useful to aid a prisoner in making his escape, with intent thereby to facilitate the escape of any prisoner confined therein, is punishable as provided in section one hundred and eight of this Code.

Conveying articles into jail to aid an escape is a substantive offense—3 Tex. Ct. App. 553; 7 Id. 623.

Assisting to break prison renders the party assisting an accessory—119 Mass. 297; 15 Me. 100; 9 Johns. 70; Russ & R. C. C. 458; 1 Car. & M. 250. So of conveying instruments to enable him to break jail—see 4 Bl. Com. 38; as a crowbar—Law R. 1 C. C. 27; but a wife is not liable if the instrument was procured by his directions—1 Car. & P. 116, note. In a trial for aiding a prisoner to escape, another prisoner escaping by the same means is not a *particeps criminis*—3 Tex. Ct. App. 533.

111. Whenever a trial shall be had of any person under any of the provisions of sections one hundred and five and one hundred and six of this Code, and whenever a convict in the State prison shall be tried for any crime committed therein, the county clerk of the county where such trial is had shall make out a statement of all the costs incurred by the county for the trial of such case, and of guarding and keeping such convict, properly certified to by a superior judge of said county, which statement shall be sent to the board of State prison directors for their approval; and after such approval, said board shall cause the amount of such costs to be paid out of the money appropriated for the support of the State prison, to the county treasurer of the county where such trial was had. [In effect April 6th, 1880.]

CHAPTER IV.

FORGING, STEALING, MUTILATING, AND FALSIFYING JUDICIAL AND PUBLIC RECORDS AND DOCUMENTS.

- § 113. Larceny, destruction, etc., of records by officers
- § 114. Larceny, destruction, etc., of records by others.
- § 115. Offering false or forged instruments to be recorded.
- § 116. Adding names, etc., to jury lists.
- § 117. Falsifying jury lists, etc.

113. Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do, is punishable by imprisonment in the State prison not less than one nor more than fourteen years.

Forgery of records.—Prejudice to others is sufficient, even if contingent and remote; erasure or mutilation of a record may be deemed a forgery—27 Iowa, 420; 10 Mass. 34.

114. Every person not an officer such as is referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the State prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding one hundred dollars, or by both.

Erasure or mutilation of a record may be deemed forgery—27 Iowa, 420; 10 Mass. 34; but not to obliterate a receipt from a bond—6 Ired. 7; or an indorsement from a note—1 Alken, 311; but it is forgery fraudulently to alter the sum in a note—4 N. H. 455; 15 Ohio St. 455; 20 Iowa, 541; Russ. & R. C. C. 101; 7 Car. & P. 669. It is forgery at common law to alter or falsify any judicial or executive record, writ, order, or deposition—2 Mass. 136; 6 Hill, 490; 50 Me. 409; 6 Car. & P. 129; 5 Id. 160; 2 East P. C. 862; 2 Sid. 71; but not political documents of no legal effect—30 La. An. 557. See Desty's Crim. Law, tit. FORGERY.

115. Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this State, which instrument, if genuine, might be filed, or registered, or recorded under any law of this State, or of the United States, is guilty of felony.

Putting a forged deed on record—27 Mich. 387; 3 Abb. App. Dec. 441.

116. Every person who adds any names to the list of persons selected to serve as jurors for the county, either by placing the same in the jury-box, or otherwise, or extracts any name therefrom, or destroys the jury-box, or any of the pieces of paper containing the names of jurors, or mutilates or defaces such names so that the same cannot be read, or changes such names on the pieces of paper, except in cases allowed by law, is guilty of a felony. [Approved March 30th, in effect July 1st, 1874.]

117. Every officer or person required by law to certify to the list of persons selected as jurors, who maliciously, corruptly, or willfully certifies to a false or incorrect list, or a list containing other names than those selected, or who, being required by law to write down the names placed on the certified lists on separate pieces of paper, does not write down and place in the jury-box the same names that are on the certified list, and no more and no less than are on such lists, is guilty of a felony.

CHAPTER V.

PERJURY AND SUBORNATION OF PERJURY.

- § 118. Perjury defined.
- § 119. Oath defined.
- § 120. Oath of office.
- § 121. Irregularity in administering.
- § 122. Incompetency of witness no defense.
- § 123. Knowledge of materiality of testimony not necessary.
- § 124. Making depositions, etc., when deemed complete.
- § 125. Statement of that which one does not know to be true.
- § 126. Punishment of perjury.
- § 127. Subornation of perjury.
- § 128. Procuring the execution of innocent persons.

118. Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury.

Perjury, is the willful and corrupt swearing to a matter of fact which the party has no probable cause for believing, or that he does not know at the time to be true—see Desty's Crim. Law, § 75 a; or where he swears that he "thought" or "believed" a fact, when in truth he thought and believed otherwise—Phill. (N. C.) 312; 10 Q. B. 670; 1 Leach, 327; but see 2 Low, 232; 1 Sprague, 558; Bald. 370; or where he swears to a fact he did not know to be true—2 Bost. L. R. 178; 17 N. H. 373; or to swear corruptly that he is ignorant of a certain fact—5 Yerg. 211; 1 Sprague, 558. The oath must be taken with deliberation, and not through surprise, inadvertence, or a *bona fide* mistake as to facts—see Desty's Crim. Law, § 75 b; or rashly or inconsiderately, according to belief—4 Dall. 372; 5 Gray, 78; 41 Md. 425; 48 Ga. 170; 7 Car. & P. 17; 11 Q. B. 1028; so if the oath be honest, and is taken under advice of counsel, it is not perjury—6 McLean, 400; 43 Iowa, 205; 5 McLean, 573; 1 Morris, 20.

Oath to be lawfully administered—see Desty's Crim. Law, § 75 c; before competent parties—Id. § 75 d; in a judicial proceeding—Id. § 75 f; or other proceedings—Id. § 75 g.

Matter sworn to, must be material—see Desty's Crim. Law, §§ 75 h-l.

Evidence—The complaint is admissible to show the pendency of the case in which the perjury is alleged to have been committed—54 Cal. 528. The evidence of one witness is not sufficient to convict; it must be something more than sufficient to counterbalance the oath of the prisoner—14 Peters, 430; S. C. 1 Green C. R. 67; 57 Mo. 252; S. C. 1 Am. Cr. R. 502.

119. The term "oath," as used in the last section, includes an affirmation, and every other mode authorized by law of attesting the truth of that which is stated.

Form of oath.—The form of oath is merely directory—11 Allen, 243. It is immaterial, except that it must be such as the witness believes is binding—12 Mass. 274; 2 Hawks, 458; 2 Murph. 320; 3 Id. 153; 1 Rob. (Va.) 729; 2 Id. 795; 8 Wend. 636; 2 Brod. & B. 232. See Desty's Crim. Law, § 76 e.

120. So much of an oath of office as relates to the future performance of official duties is not such an oath as is intended by the two preceding sections.

Official oath.—Perjury does not include future facts or contingencies—3 Zab. 43.

121. It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner.

Irregular mode.—Perjury may be committed, although the person was improperly sworn—1 Dev. 283; 10 Ohio, 220; 10 Johns. 167; 4 Seld. 67. So it may be administered on a common-prayer book—2 Kerr, 176; or on Watts' Psalms and Hymns—4 Seld. 67; and kissing the book may be omitted—1 Craw. & D. 199.

122. It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition, or certificate of which falsehood is alleged. It is sufficient that he did give such testimony or make such deposition or certificate.

Competency or incompetency of witness is immaterial—10 Johns. 167; 10 Ohio, 220; 3 Yeates, 414; or that the false testimony be inadmissible—23 N. Y. 85; 9 Cox C. C. 105.

123. It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding.

124. The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true.

125. An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.

Want of knowledge.—A false statement of a fact which he did not know at the time to be true, is perjury—2 Bost. L. R. 177; 17 N. H. 373; 6 Pa. St. 170; 6 Blinn. 244; 21 N. Y. 238; or of which he has no knowledge, 3 Parker Cr. R. 511; Hetley, 97.

126. Perjury is punishable by imprisonment in the State prison not less than one, nor more than fourteen years.

127. Every person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured.

Subornation of perjury is the procuring, instigating, inciting, or persuading another to swear falsely—3 How. 41; 5 Met. 241; 2 Leach, 509; knowing that the witness would testify to the fact, knowing it to be false—5 Met. 241; 22 Ohio St. 477; S. C. 1 Green O. R. 527; but it must be in a pending proceeding—69 Me. 218; S. C. 2 Am. Cr. R. 650; 8 Barb. 545. See Desty's Crim. Law, § 75 j.

128. Every person who, by willful perjury, or subornation of perjury, procures the conviction and execution of any innocent person, is punishable by death.

Crimen falsi includes the offense of attempting to secure the conviction of another and innocent person for a crime which he has himself committed—29 Ohio St. 351.

CHAPTER VI.

FALSIFYING EVIDENCE.

- § 132. Offering false evidence.
- § 133. Deceiving a witness.
- § 134. Preparing false evidence.
- § 135. Destroying evidence.
- § 136. Preventing or dissuading witness from attending.
- § 137. Bringing witnesses.
- § 138. Receiving or offering to receive bribes.

132. Every person who, upon any trial, proceeding, inquiry, or investigation whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged, or fraudulently altered or antedated, is guilty of felony.

Falsifying evidence—see 2 Har. (Del.) 288; 14 Md. 30.

133. Every person who practices any fraud or deceit or knowingly makes or exhibits any false statement, representation, token, or writing, to any witness, or person about to be called as a witness upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, with intent to affect the testimony of such witness, is guilty of a misdemeanor.

134. Every person guilty of preparing any false or ante-dated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony.

Fabrication of evidence—2 Hill, 282; 10 Clark. & F. 154; 2 East, 362; 5 Term. Rep. 619; 2 Show. 1. See 2 Whart. C. L. 8th ed. § 1334; 2 East P. C. 821.

135. Every person who, knowing that any book, paper, record, instrument in writing, or other matter or

thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

136. Every person who willfully prevents or dissuades any person who is or may become a witness, from attending upon any trial, proceeding, or inquiry, authorized by law, is guilty of a misdemeanor.

Dissuading witness from attending—3 Har. (Del.) 562; 20 Vt. 9; 14 Gray, 87; 1 Strange, 612; 8 Mod. 336.

137. Every person who gives, or offers, or promises to give, to any witness, or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any person to give false or withhold true testimony, is guilty of a felony. [Approved March 30th, in effect July 1st, 1874.]

138. Every person who is a witness, or is about to be called as such, who receives or offers to receive, any bribe, upon any understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial or proceeding upon which his testimony is required, is guilty of a felony. [Approved March 30th, in effect July 1st, 1874.]

CHAPTER VII.

OTHER OFFENSES AGAINST PUBLIC JUSTICE.

- § 142. Officer refusing to arrest parties charged with crime.
- § 143. Public administrator, neglect or violation of duty by.
- § 144. Receiving fee for services in arresting fugitives.
- § 145. Delaying to take person arrested before a magistrate.
- § 146. Making arrests, etc., without lawful authority.
- § 147. Inhumanity to prisoners.
- § 148. Resisting public officers in the discharge of their duties.
- § 149. Assault, etc., by officers, under color of authority.
- § 150. Refusing to aid officers in arrest, etc.
- § 151. Taking extra-judicial oaths.
- § 152. Administering extra-judicial oaths.
- § 153. Compounding crimes.
- § 154. Debtor fraudulently concealing his property.
- § 155. Defendant fraudulently concealing his property.
- § 156. Fraudulent pretenses relative to birth of infant.
- § 157. Substituting one child for another.
- § 158. Common barratry defined. How punished.
- § 159. What proof is required.
- § 160. Misconduct by attorneys.
- § 161. Buying demands or suit by an attorney.
- § 162. Attorneys forbidden to defend prosecutions carried on by their partners or formerly by themselves.
- § 163. Limitation of preceding section.
- § 164. Grand juror acting after challenge has been allowed.
- § 165. Bribing boards of supervisors, etc.
- § 166. Criminal contempts.
- § 167. False certificates by public officers.
- § 168. Disclosing fact of indictment having been found.
- § 169. Disclosing what transpired before the grand jury.
- § 170. Maliciously procuring search warrant.
- § 171. Unauthorized communication with convict.
- § 172. Keeping liquor within two miles of State prison.
- § 173. Importing foreign convicts.
- § 174. Bringing Chinese into the State.
- § 175. Separate and distinct prosecution.
- § 176. Omission of duty by public officer.
- § 177. Offense for which no penalty is prescribed.
- § 178. Officers of corporations not to employ Chinese.
- § 179. Corporations not to employ Chinese.

142. Every sheriff, coroner, keeper of a jail, constable, or other peace officer, who willfully refuses to receive or arrest any person charged with a criminal offense, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

Negligence of a public duty is an indictable offense, although no mischief accrued therefrom—2 Cold. 181; 1 Bay, 316; 3 Bush, 39; 4 id. 331; 1 Yeates, 419; Conf. Rep. 38.

143. Every person holding the office of public administrator, who willfully refuses or neglects to perform the duties thereof, or who violates any provision of law relating to his duties or the duties of his office, for which some other punishment is not prescribed, is punishable by fine not exceeding five thousand dollars, or imprisonment in the county jail not exceeding two years, or both.

144 Every person who violates any of the provisions of section one thousand five hundred and fifty-eight is guilty of a misdemeanor.

145. Every public officer or other person, having arrested any person upon a criminal charge, who willfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor.

146. Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor.

147. Every officer who is guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody, is punishable by fine not exceeding two thousand dollars, and by removal from office.

148. Every person who willfully resists, delays, or obstructs any public officer, in the discharge or attempt to

discharge any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

Resisting officer.—To constitute the offense, the officer must be authorized to execute the process, and the process must be legal—2 Gale & D. 361; 6 Gray, 354; 1 Denio, 574; 12 Met. 233; 5 Barn. & C. 38; 1 Car. & K. 469; 1 Leach, 516; 11 Price, 235. The official acts of an officer *de facto* are valid so far as the rights of the public or of the persons are concerned—12 Ala. 840; 21 Ga. 217. There must be some overt act—39 Conn. 244; S. C. 1 Green C. R. 296; but a blow is not necessary—36 Ala. 273; 44 Vt. 636. Remonstrance is not resistance—3 Brewst. 343; see 41 Ga. 507; nor is refusal to obey an officer an indictable resistance—43 Md. 490; 28 Ohio St. 196; 37 Wis. 195; 43 Tex. 329. Violence against the officer is necessary—3 Wash. C. C. 335. See Desty's Crim. Law, § 76 a.

149. Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

Assaults by officers.—Where a parish officer, against the will of a pauper, cut off her hair—4 Car. & P. 239; see 6 Jur. 243; or where an almshouse keeper applied unnecessarily severe chastisement—34 Conn. 132. See 77 N. C. 494.

150. Every male person above eighteen years of age who neglects or refuses to join the posse comitatus or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge, or justice of the peace, or other officer concerned in the administration of justice, is punishable by fine of not less than fifty nor more than one thousand dollars.

151. Repealed. [Approved March 30th, in effect July 1st, 1874.]

152. Repealed. [Approved March 30th, in effect July 1st, 1874.]

153. Every person who, having knowledge of the actual commission of a crime, takes money or property of another, or any gratuity or reward, or any engagement or promise thereof, upon any agreement or understanding to compound or conceal such crime, or to abstain from any prosecution thereof, or to withhold any evidence thereof, except in the cases provided for by law in which crimes may be compromised by leave of court, is punishable as follows:

1. By imprisonment in the State prison not exceeding five years, or in a county jail not exceeding one year, where the crime was punishable by death or imprisonment in the State prison for life.

2. By imprisonment in the State prison not exceeding three years, or in the county jail not exceeding six months, where the crime was punishable by imprisonment in the State prison for any other term than for life.

3. By imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, where the crime was a misdemeanor.

Compounding offenses.—An agreement not to prosecute, or to put an end to a prosecution, in consideration of some peculiar advantage, constitutes the offense, when the party knows the offense to have been committed—2 Har. (Del.) 532. See 4 Bl. Com. 133; 1 Bish. C. L. 6th ed. § 604; 1 Hawk. P. C. ch. 59, § 5. See Desty's Crim. Law, § 10 a.

Agreements not to prosecute.—Receiving any valuable consideration on an agreement not to prosecute is compounding the offense—see Desty's Crim. Law, § 74 d.

Compromising offenses.—An offense which, in the discretion of the court, may be punished by imprisonment in the penitentiary, cannot be compromised—39 Ga. 85; but some misdemeanors could be compounded, and others not, in the absence of statutory provisions—11 East, 46; 5 id. 294; 4 Barn. & Adol. 421; 7 Taunt. 422. See Washburn C. L. 13; 1 Bish. C. L. 6th ed. § 716; 1 Chit. C. L. 4; Desty's Crim. Law, § 10 b. The law will permit a compromise in all offenses, though made subject of a criminal prosecution, for which offenses the injured party might recover damages—6 Q. B. 308; S. C. 2 Lead. C. C. 216; provided the rights of the public are preserved inviolate—14 Q. B. 529; 11 East, 46; 7 Taunt. 422; 9 Up. Can. Q. B. 540.

Punishment.—The punishment is graduated according to the enormity of the offense—13 Pick. 440. It is punished at common law by fine and imprisonment—1 Russ Cr. 9th ed. 194; 4 Bl. Com. 133.

154. Every debtor who fraudulently removes his property or effects out of this State, or fraudulently sells, conveys, assigns, or conceals his property, with intent to

defraud, hinder, or delay his creditors of their rights, claims, or demands, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both.

Fraudulent concealment of property with intent to defraud creditors—see 36 N. H. 196; 105 Mass. 530; 5 Serg. & R. 519. It is not necessary that the parties attempted to be defrauded should be judgment creditors—16 Wend. 546; 2 Johns. Ch. 144. An intent to defraud must be shown, and, in case of receivers, a guilty knowledge of such intent—15 Gray, 189; 112 Mass. 289.

155. Every person against whom an action is pending or against whom a judgment has been rendered for the recovery of any personal property, who fraudulently conceals, sells, or disposes of such property, with intent to hinder, delay, or defraud the person bringing such action or recovering such judgment, or with such intent removes such property beyond the limits of the county in which it may be at the time of the commencement of such action or the rendering of such judgment, is punishable as provided in the preceding section.

156. Every person who fraudulently produces an infant, falsely pretending it to have been born of any parent whose child would be entitled to inherit any real estate or to receive a share of any personal estate, with intent to intercept the inheritance of any such real estate, or the distribution of any such personal estate from any person lawfully entitled thereto, is punishable by imprisonment in the State prison not exceeding ten years.

157. Every person to whom an infant has been confided for nursing, education, or any other purpose, who, with intent to deceive any parent or guardian of such child, substitutes or produces to such parent or guardian another child in the place of the one so confided, is punishable by imprisonment in the State prison not exceeding seven years.

158. Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six months, and by fine not exceeding five hundred dollars.

Barratry is the practice of moving or exciting quarrels between other persons, whether at law or otherwise—11 Pick. 432; and see 15 Mass. 227; 13 Pick. 359; 52 Pa. St. 243; 1 Ball. 379. A justice of the peace, or a magistrate—1 Ball. 379—or an attorney advising or encouraging a groundless action, may be guilty of barratry—3 Mod. 97. See Desty's Crim. Law, § 74 a.

159. No person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt or malicious intent to vex and annoy.

Malicious design.—There must be a malicious design as manifested by several instances of offending—15 Mass. 227; 1 Ball. 379; 11 Pick. 432; 1 Cush. 2. The design must be to harass and oppress—15 Mass. 227.

160. Every attorney who, whether as attorney or as counsellor, either—

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Willfully delays his client's suit with a view to his own gain; or,

3. Willfully receives any money or allowance for or on account of any money which he has not laid out or become answerable for;

—is guilty of a misdemeanor.

• Solicitors and officers of courts, by gross fraud and corruption, doing injustice to clients, are guilty of contempt—5 Best & Smith, 299.

161. Every attorney who, either directly or indirectly, buys, or is interested in buying, any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor.

Buying demands.—It is a misdemeanor for an attorney to buy any evidence of debt, or thing in action, with intent to bring suit thereon. *Brandon v. Cal. S. M. Co.* 6 Pac. Coast L. J. 618; 4 Bl. Com. 135.

Bribing members of a municipal board—33 N. J. 102.

162. Every attorney who, directly or indirectly, advises in relation to, or aids, or promotes the defense of any action or proceeding in any court, the prosecution of which is carried on, aided, or promoted by any person as district attorney, or other public prosecutor, with whom such person is directly or indirectly connected as a partner; or who, having himself prosecuted, or in any manner

aided or promoted any action or proceeding in any court as district attorney or other public prosecutor, afterwards, directly or indirectly, advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from or on behalf of any defendant in any such action, upon any understanding or agreement whatever having relation to the defense thereof, is guilty of a misdemeanor, and in addition to the punishment prescribed therefor, forfeits his license to practice law.

163. The preceding section does not prohibit an attorney from defending himself in person, as attorney or counsel, when prosecuted, either civilly or criminally.

164. Every grand juror who, with knowledge that a challenge interposed against him by a defendant has been allowed, is present at, or takes part, or attempts to take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor.

165. Every person who gives or offers a bribe to any member of any common council, board of supervisors, or board of trustees of any county, city, or corporation, with intent to corruptly influence such member in his action on any matter or subject pending before the body of which he is a member, and every member of either of the bodies mentioned in this section who receives or offers to receive any such bribe, is punishable by imprisonment in the State prison for a term not less than one nor more than fourteen years, and is disqualified from holding any office in this State.

166. Every person guilty of any contempt of court of either of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly

tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Behavior of the like character committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law.

3. Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any court.

4. Willful disobedience of any process or order lawfully issued by any court.

5. Resistance willfully offered by any person to the lawful order or process of any court.

6. The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question.

7. The publication of a false or grossly inaccurate report of the proceedings of any court.

8. Presenting to any court having power to pass sentence upon any prisoner under conviction, or to any member of such court, any affidavit, or testimony, or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this Code.

Subd. 1. Any disrespect to the judge sitting in court, or any breach of order, decency, or decorum, or any assault in view of the court, is a contempt—4 Ind. 627; 1 Blackf. 166; 36 Ind. 196; 28 Id. 47; 25 Id. 362; 28 Id. 205; as violence or threats to judge, justice, or officer of court, or to a juror, witness, or party litigant—2 Va. Cas. 1; or abusive language to the court, as in a petition filed with the clerk—11 La. 599; or unprofessional or disrespectful language by an attorney—28 Ind. 205; 4 Id. 627; 36 Ala. 252.

Subd. 3. All acts calculated to impede, embarrass, or obstruct courts of justice, should be considered done in presence of the court—64 Ill. 195; S. C. 1 Am. Cr. R. 107; and if committed without and beyond its actual presence, it is a constructive contempt—36 Ind. 196.

Subd. 4. Disobedience of orders of court is a contempt—Taney, 362; so, of justices' courts—2 Burr. 798. Disobedience by inferior magistrates and judges, disregarding adjudications of superior courts, and refusing to proceed in causes—63 Ind. 81. So, of the disobedience of an inferior officer of the court—24 N. Y. 77. Disobedience of an executor or administrator to decree of distribution—55 Cal. 193.

Subd. 6. The refusal of a witness to testify or to answer a proper question—1 Ind. 161.

Subd. 7. Any public discussion which interferes with the course of justice is a contempt—Wall. Sr. 77; 12 Johns. 460; 3 Yeates, 438; 63 N. C. 397; 16 Ark. 384; 64 Ill. 195; or publications reflecting upon the court—Wall. Sr. 77; 12 Cox C. C. 358; and libelous publication relative to court proceedings—16 Ark. 384; 4 Ill. 405; as an attorney writing and publishing strictures upon the opinion of the court—3 Wheel. C. C. 1; 41 Up. Can. Q. B. 42.

Contempt, what constitutes—9 Wheat. 204. The following have been held contempts: Misbehavior by an officer, as a sheriff to be guilty of malpractice—2 Burr. 799; or a clerk to fraudulently withhold money belonging to an estate—1 Blackf. 166; or an attorney entering a dismissal in disrespectful language—1 Ind. 161; 28 id. 47; or for filing an indecent petition for divorce—4 Id. 627; or for instituting a fictitious suit—20 Id. 546; 3 Tex. 360; 8 How. 255; or for suing out an attachment for a witness who has not been served with process—2 Colo. 25; or failing to pay or replevy a judgment—45 Ind. 308; or making use of false instrument to obstruct justice—6 Term Rep. 619; but to refuse to defend a poor person—4 Ind. 525—or to advise a client of the legal consequences of forfeiture of a recognizance, is not a contempt—4 Blackf. 574. Defendant participating in a rescue, and escaping from custody—1 Dutch. 209; or, after judges had vacated the bench for recess, approaching the chief justice, using abusive and vituperative language—25 La. An. 532; or proposing to a juror to signal from the window of the jury-room how the jury stand—32 N. J. L. 403; or, while a criminal charge is pending, to impugn the impartiality of the judge, or excite public prejudice, is a contempt—Wall. Sr. 77; 12 Johns. 460; 3 Yeates, 438; 63 N. C. 397; 16 Ark. 384; 64 Ill. 195.

Power to punish for contempts.—Every court has a right to protect itself from a violation of its decency and propriety—4 Ind. 627; 1 Blackf. 166; 36 Ind. 196; 23 id. 47; 25 id. 362; 28 id. 205, and has an inherent power to punish for contempt of its rules and orders—see many cases cited in Desty's Crim. Law, § 73 a; and for constructive contempts—Id. Justices of the peace have the same power as courts of record—1 Cal. 15; 47 id. 131; 46 Ind. 537.

167. Every public officer authorized by law to make or give any certificate or other writing, who makes and delivers as true any such certificate or writing, containing statements which he knows to be false, is guilty of a misdemeanor.

168. Every grand juror, district attorney, clerk, judge, or other officer, who, except by issuing or in executing a warrant of arrest, willfully discloses the fact of a presentment or indictment having been made for a felony, until the defendant has been arrested, is guilty of a misdemeanor.

169. Every grand juror who, except when required by a court, willfully discloses any evidence adduced before the grand jury, or anything which he himself, or any other member of the grand jury, may have said, or in what

manner he or any other grand juror may have voted on a matter before them, is guilty of a misdemeanor.

170. Every person who maliciously and without probable cause procures a search-warrant or warrant of arrest to be issued and executed, is guilty of a misdemeanor.

171. Every person, not authorized by law, who, without the consent of the warden, or other officer in charge of the State prison, communicates with any convict therein, or brings into or conveys out of the State prison any letter or writing to or from any convict, is guilty of a misdemeanor.

172. Every person who, within two miles of the land belonging to this State, upon which the State prison is situated, or within one mile of the Insane Asylum at Napa, or within one mile of the grounds belonging and adjacent to the University of California in Alameda County, or in the State capitol, or within the limits of the grounds adjacent and belonging thereto, sells, gives away, or exposes for sale, any vinous or alcoholic liquors, is guilty of a misdemeanor. [In effect April 3rd, 1876.]

173. Every captain, master of a vessel, or other person, who willfully imports, brings, or sends, or causes or procures to be brought or sent, into this State, any person who is a foreign convict of any crime which, if committed within this State, would be punishable therein, (treason and misprision of treason excepted) or who is delivered or sent to him from any prison or place of confinement in any place without this State, is guilty of a misdemeanor.

174. Every person bringing to or landing within this State any person born either in the empire of China or Japan, or the islands adjacent to the empire of China, without first presenting to the commissioner of immigration evidence satisfactory to such commissioner that such person desires voluntarily to come into this State, and is

a person of good character, and obtaining from such commissioner a permit describing such person and authorizing the landing, is punishable by a fine of not less than one nor more than five thousand dollars, or by imprisonment in the county jail not less than two nor more than twelve months.

175. Every individual person of the classes referred to in the two preceding sections, brought to or landed within this State contrary to the provisions of such sections, renders the person bringing or landing liable to a separate prosecution and penalty.

176. Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.

177. When an act or omission is declared by a statute to be a public offense, and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor. [Approved March 30th, in effect July 1st, 1874.]

178. Any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employé, assignee, or contractor of any corporation now existing, or hereafter formed under the laws of this State, who shall employ, in any manner or capacity, upon any work or business of such corporation, any Chinese or Mongolian, is guilty of a misdemeanor, and is punishable by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail of not less than fifty nor more than five hundred days, or by both such fine and imprisonment; *provided*, that no director of a corporation shall be deemed guilty under this section who refuses to assent to such employment, and has such dissent recorded in the minutes of the board of directors.

1. Every person who, having been convicted for vio-

lating the provisions of this section, commits any subsequent violation thereof after such conviction, is punishable as follows:

2. For each subsequent conviction, such person shall be fined not less than five hundred nor more than five thousand dollars, or by imprisonment not less than two hundred and fifty days nor more than two years, or by both such fine and imprisonment. [In effect February 13th, 1880.]

179. Any corporation now existing, or hereafter formed under the laws of this State, that shall employ, directly or indirectly, in any capacity, any Chinese or Mongolian, shall be guilty of a misdemeanor, and upon conviction thereof shall for the first offense be fined not less than five hundred nor more than five thousand dollars, and upon the second conviction shall, in addition to said penalty, forfeit its charter and franchise, and all its corporate rights and privileges, and it shall be the duty of the attorney-general to take the necessary steps to enforce such forfeiture. [In effect February 13th, 1880.]

CHAPTER VIII.

CONSPIRACY.

- § 182. Criminal conspiracy defined and punishment fixed.
- § 183. No other conspiracies punishable criminally.
- § 184. Overt act, when necessary.
- § 185. Wearing mask or disguise.

182. If two or more persons conspire—

1. To commit any crime;
2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime;
3. Falsely to move or maintain any suit, action, or proceeding;
4. To cheat and defraud any person of any property by any means which are in themselves criminal, or to obtain money or property by false pretenses; or,
5. To commit any act injurious to the public health, to public morals, or for the perversion or obstruction of justice, or due administration of the laws;

—they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both. [Approved March 30th, in effect July 1st, 1874.]

Conspiracy.—A conspiracy is a combination of two or more persons by concerted action to accomplish some criminal or unlawful purpose, or to accomplish some lawful purpose by criminal or unlawful means—see many cases cited in Desty's Crim. Law, § 11 a.

Subd. 1. To commit an indictable offense—29 Pa. St. 296; as, to kill—32 Cal. 251; or to rob—49 Ind. 186; or commit burglary—2 Tex. Ct. App. 192; or to kidnap—11 Low. Can. Jur. 41; or to seduce a female—25 Ill. 1; 9 How. St. Tr. 127; or entice and carry off a female—5 Rand. 627; 25 Ill. 23; 5 Watts & S. 461; or procure defilement of a girl—2 Den. C. C. 79; or persuade a girl to prostitution—4 Fost. & F. 160; 9 How. St. Tr. 127; or any offense—2 Camp. 227; as bigamy or incest—14 Pa. St. 226; or abortion—Bright. 441.

Subd. 2. To charge one with crime—2 Mass. 536; 25 Ill. 70; 2 Dutch. 313; 5 Har. & J. 317; 2 Mass. 536; 58 N. Y. 177; 2 Pars. Cas. 367; 1 Leach. 45; 2 Burr. 993; 1 Saik. 174; 7 L. Reporter, 53; 4 Barn. & C. 329.

Subd. 4. To cheat—9 Mass. 415; 9 Pa. St. 211; 4 Id. 210; 2 Har. (Del.) 327; 2 Allen, 168; Thach. C. C. 609; 1 Cush. 190; 4 Iowa, 29; 1 Mich. 216; 108 Mass. 309; 4 Pa. St. 210; 3 Zab. 33; 3 Q. B. 292; 12 Cox C. C. 338; id. 316; 2 Day, 205; 64 Me. 369; 9 Cowen, 578; 4 Dill. 407; 4 Strob. 266; 7 Tex. 173; 12 R. I. 124; 25 Vt. 458; 16 Wend. 546; 4 Met. 111; 1 Dev. 357; 8 Rich. 72; 15 N. H. 396; 1 Cush. 111; 39 N. J. L. 324; 5 Har. & J. 317; 4 Halst. 293; 10 Mich. 310; 4 Cox C. C. 390; 8 Id. 305. See Desty's Crim. Law, § 11 d.

Subd. 5. Public health—2 Ld. Raym. 1179. See 12 Conn. 101.

Public peace—2 Camp. 358; 6 Term Rep. 623.

Public justice—8 Moody, 11; 6 Mod. 185; 25 Vt. 415.

Public trade—4 Met. 111; 82 Mass. 221; 75 Id. 127; 1 Strange, 144; 1 Leach, 274; 13 East, 228. See Desty's Crim. Law, § 11 b.

183. No conspiracies, other than those enumerated in the preceding section, are punishable criminally.

184. No agreement, except to commit a felony upon the person of another, or to commit arson, or burglary, amounts to a conspiracy, unless some act, beside such agreement, be done to effect the object thereof, by one or more of the parties to such agreement.

An agreement to commit an act, if it amounts to a conspiracy, is in general complete without an overt act—50 Ind. 186; 1 Am. Cr. R. 105; 42 N. H. 393; 12 Minn. 164; 1 Cush. 189; 25 Vt. 415; 9 Mass. 415; 4 Halst. 293; 4 Wend. 229; 4 Mich. 414; 31 Me. 386; 23 Pa. St. 355; 48 Miss. 234; as it is itself an overt act—1 Cush. 189; 1 Strange, 193; and see 2 Mass. 329; 5 Har. & J. 317. The gist of the offense is the fraudulent and corrupt combination with intent that injury shall result—2 Ashm. 247; 7 Barb. 391; 4 Halst. 293; 5 Har. & J. 317; 2 Mass. 329; 23 Pa. St. 355; 5 McLean, 613; 16 Up. Can. Q. B. 543; 1 Ad. & E. 706; 1 Moody & R. 402; 5 Q. B. 49; 9 Coke, 55; Salk. 174; as any act done in pursuance of it is no constituent part of the offense, but merely an aggravation of it—2 Mass. 329; 4 Halst. 293; 5 Har. & J. 217; and see cases cited in Desty's Crim. Law, § 11 g.

Merger.—A conspiracy to commit a felony, when executed, is merged in the felony—1 Duval, 4; 5 Mass. 106; 4 Wend. 265; 2 Pars. Cas. 341; 1 Mich. 216; 5 Watts & S. 345; 25 Vt. 415; 48 Me. 218; when to commit a higher crime, it is merged, but not when the conspiracy and the crime are of the same grade—48 Me. 218; 15 Id. 100; 5 Mass. 106; 105 Id. 53; 108 Id. 309; 109 Id. 349; 2 Met. 193; 1 Mich. 216; 2 Pars. Cas. 341; 5 Pa. St. 60; 19 Pick. 479; 25 Vt. 415; 5 Pa. St. 60; 4 Wend. 265. But see 66 Mass. 84; 9 Cowen, 577; 6 Ala. 765; 3 Cox C. C. 229.

185. It shall be unlawful for any person to wear any mask, false whiskers, or any personal disguise (whether complete or partial) for the purpose of—

1. Evading or escaping discovery, recognition, or identification in the commission of any public offense.

2. Concealment, flight, or escape, when charged with, arrested for, or convicted of, any public offense. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor. [Approved March 30th, in effect July 1st, 1874.]

TITLE VIII.

Of Crimes against the Person.

- CHAP. I. HOMICIDE.
II. MAYHEM.
III. KIDNAPPING.
IV. ROBBERY.
V. ATTEMPTS TO KILL.
VI. ASSAULTS WITH INTENT TO COMMIT FELONY,
OTHER THAN ASSAULTS WITH INTENT TO
MURDER.
VII. DUELS AND CHALLENGES.
VIII. FALSE IMPRISONMENT.
IX. ASSAULT AND BATTERY.
X. LIBEL.

PEN. CODE.—8.

CHAPTER I.

HOMICIDE.

- § 187. Murder defined.
- § 188. Malice defined.
- § 189. Degrees of murder.
- § 190. Punishment of murder.
- § 191. Petit treason abolished.
- § 192. Manslaughter—voluntary and involuntary.
- § 193. Punishment of manslaughter.
- § 194. Deceased must die within a year and a day.
- § 195. Excusable homicide.
- § 196. Justifiable homicide by public officers.
- § 197. Justifiable homicide by other persons.
- § 198. Bare fear not to justify killing.
- § 199. Justifiable and excusable homicide not punishable.

187. Murder is the unlawful killing of a human being, with malice aforethought.

Murder, defined—34 Cal. 200; 47 Cal. 102; at common law—1 Wash. C. C. 463; 2 Halst. 220; 1 Colo. 137; 44 Cal. 96; 9 Met. 93; 5 Cush. 295; see 4 Bl. Com. 195. It has but one meaning—the intentional killing of a human being, with malice aforethought—44 Cal. 96; 48 Id. 85; 52 Id. 452.

It is murder if the wound is inflicted with a felonious intent, and death ensue within a year and a day—9 Cal. 273.

The killing may be by any act, direct or indirect, which results in death—9 Met. 93; 63 N. C. 1; 4 Mason, 105; 4 Dev. & B. 365.

The person killed must be "in being," and a child in its mother's womb is not a "human being," within the definition—6 Car. & P. 349; 1 Moody C. C. 346; but every part of it must have come from the mother—6 Car. & P. 349; 7 Id. 814; Id. 850; 5 Id. 329; 7 Id. 850.

Murder includes voluntary and involuntary manslaughter—5 Ga. 441; 10 Id. 102; 17 Id. 483; 1 Id. 222; 5 Id. 85; 15 Id. 117; 5 Id. 54; 19 Id. 7; 14 Bush, 601.

In case of adultery.—It is only when the husband discovers his wife in the act of adultery that the law mitigates the killing of her or her paramour on the ground of passion—4 Mich. 83; 10 Id. 212; 29 Ga. 734; 2 Brewst. 383; 8 Ired. 330; 3 Jones, (N. C.) 74; 6 Id. 433; 54 Mo. 153; Manning's Case, 1 Vent. 212; S. C. Ld. Raym. 212; Pearson's Case, 2 Lewin, 216; or where there was no opportunity for the passion to subside—22 N. Y. 147; but to kill an adulterer deliberately, and upon revenge, is murder—54 Mo. 153; 35 Ind. 80; 62 N. Y. 229; 3 Jones, (N. C.) 74; 6 Id. 433; 64 N. C. 608; 78 Id. 515; 8 Car. & P. 182; or to kill because he has at some previous time committed adultery with his wife—6 Jones, (N. C.) 433; 4 Id. 74; 8 Ired. 330; or where he was a long time cognizant of the adulterous intercourse—35 Ind. 80; or to kill because

he believed her paramour was about to commit another similar act, is murder—4 Jones, (N. C.) 74; 6 id. 433.

Suicide.—At common law, if two agree to commit suicide together and one escapes, the other is guilty of murder—Russ. & R. C. C. 528; the survivor is principal in the murder of the other—13 Mass. 359; 123 id. 422; 23 Ohio St. 165; 8 Car. & P. 410; Russ. & R. C. C. 528.

Infanticide.—If a child be born alive and afterward dies from poisons, or by bruises received in the womb, it is murder—49 N. Y. 86; 5 Car. & P. 329; 9 id. 754; 1 Moody C. C. 346; or, if it was born in a state in which it was more likely to die than if born in due time, it is murder—2 Car. & K. 784. There must have been an independent circulation, or it cannot be considered to be alive when born, so as to make it murder—43 Iowa, 519; S. C. 2 Am. Cr. R. 274; 2 Moody C. C. 260; 5 Car. & P. 539; 7 id. 850; 9 id. 754; and if the mother kill it while still alive, it is murder, though still attached by the umbilical cord—49 N. Y. 86; 8 Phila. 623; 1 Car. & M. 650; 13 Cox C. C. 79; 7 Car. & P. 814; 9 id. 25. A child must be actually born in a living state before it can be a subject of murder—5 Car. & P. 329; 9 Up. Can. L. J. 138. A person charged with murder, committed in an attempt to produce an abortion, is entitled to be admitted to bail—6 Pac. C. L. J. 725.

In mutual combat.—Where parties by mutual understanding engage in a conflict and death ensues, the slayer is guilty of murder—37 Mo. 40; S. C. 1 Am. Cr. R. 251. So to enter into a combat with a deadly weapon, intending to use it, and in the contest to kill—32 Vt. 491; 1 Va. Cas. 10; or in a combat without weapons, to draw a knife and kill—4 Ired. 409; or to prepare and conceal a weapon before going into the fight, and killing with it—38 Miss. 531; 4 Ired. 409; or to invite another to mortal combat, and killing him, while he is going for his weapon—33 Ga. 4; see 2 Wheel. C. C. 471; or to bring about a deadly quarrel, and killing one of the combatants—22 Ga. 211; or if one of two combatants retreated and the other followed, overtook and stabbed him, it is murder—9 Ired. 485; 1 Spear, 384.

In resisting arrest.—When a person in resisting arrest under lawful process kills the officer, or one of the arresting party, it is murder—25 Ala. 15; 30 Ga. 426; 2 Houst. 585; 12 Cox C. C. 444; S. C. 1 Green C. R. 155; 6 Cold. 283. Where after the commission of a felony the wrongdoers flee, and are overtaken by the officer, who orders them to surrender, if they fire upon and kill him it is murder—27 Cal. 522. So where the accused were convicts and killed the guard to effect their escape, it was murder—1 Tex. Ct. App. 647. Private persons lawfully arresting offenders are under the same protection of the law as officers—61 Pa. St. 352; 1 East P. C. 298. But if an arrest be without authority—2 Houst. 585; 72 Ill. 37; S. C. 63 Ill. 111; 1 Am. Cr. R. 287; 12 Cush. 246; or if he exceed his authority, or if the process be defective—69 Ill. 111; S. C. 72 Ill. 37; 1 Am. Cr. R. 287; as attempting to arrest under a warrant without seal: the killing will be manslaughter—1 East P. C. ch. 5, § 58.

In committing other offenses.—If an unlawful act be done deliberately, and with the intention of doing mischief, and death ensues, it is murder—11 Humph. 150; as in the prosecution of an unlawful design, and using poison—3 Mich. 10, 22; or if he attack another with malice aforethought, and he kills to save his own life—4 Dev. & B. 491; or where he shot at another and killed a third person—2 Strob. 77; or if he provokes a fight and kills his adversary—10 Ga. 103; 18 id. 356. See Phil. (N. C.) 425; 65 N. C. 669.

188. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It

is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Malice express or implied.—Express malice means ill-will against a person, but in a legal sense it denotes a wrongful act done without just cause or excuse—34 Cal. 48; see cases cited in Desty's Crim. Law, § 8 a; an illegal act willfully done, which in its necessary consequence must injure another—12 Fla. 117; Law R. 1 C. C. 360. Implied malice is an inference deduced from particular facts and circumstances judicially ascertained—19 Conn. 398; 4 Jones, (N. C.) 100; 5 Blackf. 149; 12 Allen. 185; 39 Ind. 553; 2 Bay, 360; 10 Met. 259; 3 Cox C. C. 281; Bell C. C. 1; 8 Cox C. C. 74; while express malice is never to be inferred, but must be proved *aliunde*—18 Ind. 336; 2 Bailey, 569; Meigs, 84; 12 Tex. 540; 43 Id. 103; 1 Curt. 364; 2 Bos. & P. 508; 7 Car. & P. 140; 1 Car. & K. 155; 2 Leach, 1033; Russ. & R. C. C. 310. See *ante*, § 7, subd. 4.

Legal malice.—Implied malice or malice in law is an evil design in general, where the circumstances manifest a wicked, depraved, wanton, and malignant spirit—43 Cal. 350; 2 Mason, 91; Wright, 20; 2 Strob. 77; 11 Humph. 150; 13 Smedes & M. 263; 13 Up. Can. Q. B. 542; 10 Low. Can. Jur. 97; and the intent is presumed—1 Parker Cr. R. 154; 1 Ired. 354; 5 Cush. 295; 2 Hill, 459; 18 Ala. 720; 57 Mo. 40; S. C. 1 Am. Cr. R. 251.

Malice aforethought, which is an ingredient of murder, is express or implied—48 Cal. 95. It includes all states of mind in which a homicide is committed without legal justification, extenuation, or excuse—5 Tex. Ct. App. 163; 34 Cal. 43. It distinguishes murder from all other classes of homicide—43 Cal. 437; 6 Pac. C. L. J. 399; 6 Tex. Ct. App. 268; 2 Barn. & C. 268.

Malice and intent to kill, are essential elements in murder—Wright, 20; and they are to be inferred from the facts and circumstances of the case—8 Cal. 50; 53 Ga. 35; 30 Mich. 16; 29 Ohio St. 186; S. C. 2 Am. Cr. R. 251; 7 N. Y. 335; 53 Pa. St. 9; 2 Mason, 91; 54 Mo. 153; 23 Ind. 231; 30 Mich. 16; 83 Pa. St. 131; 5 Tex. Ct. App. 493; 15 Gratt. 634; 2 Rob. (Va.) 771; 1 Colo. 436.

189. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree. [Approved March 30th, in effect July 1st, 1874.]

Degrees of murder.—The statute dividing murder into degrees does not make murder of the second degree less than murder—44 Cal. 97. The difference in the degrees of murder results from the condition of the mind in which the design is created, and not from the speed with which it is executed—3 Tex. Ct. App. 656. The division into degrees seeks only to graduate the punishment, in proportion to the atrocity of the crime—2 Va. Cas. 387. The classification into degrees does not make the lesser less than murder—25 Cal. 361; 44 Id. 98. The jury may find the party guilty of less than murder, say manslaughter—49 Cal. 171.

Deliberation.—Unless it be in perpetrating a felony, there must be a deliberate, premeditated, preconceived design to take life to constitute murder in the first degree—39 Cal. 694; 12 Nev. 140; 12 id. 300; 43 Cal. 552; 5 Oreg. 216; 64 Mo. 591; S. C. 2 Am. Cr. R. 313; 61 Mo. 548; 64 id. 317. Deliberation implies some degree of reflection—75 Pa. St. 403; S. C. 1 Am. Cr. R. 262. No appreciable time need intervene between the premeditated intent and the homicidal act—17 Cal. 389; 24 id. 30; 34 id. 211; 43 id. 352; S. C. 1 Green C. R. 412; 44 Cal. 96; 48 id. 95; 49 id. 169; 6 Pac. C. L. J. 631; 54 Ala. 155; 75 Pa. St. 403; S. C. 1 Am. Cr. R. 262; 18 Mo. 419; 13 id. 382; 23 id. 287; 38 id. 270; 54 id. 153; 8 Iowa, 525; see 3 Nev. 409; 3 Head, 127; 66 Ind. 433; 6 Blackf. 299; 23 Ind. 231; 44 Pa. St. 55; 26 Ark. 334; 18 Mo. 435; 1 Tex. Ct. App. 159.

Presumption of premeditation.—Premeditation may be inferred from the circumstances of the case, as from the use of a weapon likely to take life—31 Pa. St. 198; 4 Humph. 139; 4 Dall. 145; 2 Ashm. 69; 1 Zab. 196; or from deliberately procuring a weapon to take life—83 Pa. St. 75; 2 Va. Cas. 484; or concealing a weapon—8 Leigh, 749; or from a declared purpose—1 Ohio St. 66; 5 Humph. 145; 2 Va. Cas. 484; or from preparations to conceal the body—84 Pa. St. 187.

Murder in the first degree.—Premeditation is presumed from purchasing poison and putting it in the way of others—45 Ala. 43; 40 Ind. 516; 2 Fost. & F. 833; 9 Car. & P. 356; 10 Cox C. C. 486. *Murder by poison*—24 Cal. 17; 17 id. 324; 34 id. 211; 5 Oreg. 276; 23 Ohio St. 146; 1 Tex. Ct. App. 163; id. 605; 5 id. 493; 7 Humph. 429; see 7 Cox C. C. 253; 28 Ga. 576; 33 id. 571. Poison means any substance which, when applied externally, or in any way introduced into the system, without acting mechanically, but by its own inherent qualities, is capable of destroying life—53 Cal. 147. Other noxious or destructible substances or liquids are such as act upon the system mechanically so as to destroy life—id. *By lying in wait*—24 Cal. 17; 34 id. 211; 4 Humph. 136; 7 id. 429; 9 id. 657; 4 Tex. Ct. App. 493. "Concealed" is not synonymous with "lying in wait"—55 Cal. 207. A person concealed may shoot another without committing murder—id.; but if he conceals himself for the purpose of shooting another, he is "lying in wait"—id. *By cruelty and torture*—7 Gratt. 673; 4 Dev. & B. 365; 63 N. C. 1; 68 Mo. 315; 4 Mason, 505; 80 N. C. 358; 10 Verg. 551; 2 Humph. 439; 9 Ired. 429; 31 Ga. 40; 40 Ala. 350; 101 Mass. 1; 8 Ohio, 131; 11 Fla. 247. Aside from the *perpetration of a felony*, murder in the first degree is any kind of unlawful, willful, and deliberate killing—48 Cal. 95; 17 id. 389; 43 id. 344; 34 id. 211; 24 id. 17; 39 id. 694; 43 id. 552; 12 Nev. 140; id. 300; 5 Oreg. 216; 64 Mo. 591; S. C. 2 Am. Cr. R. 313; 61 Mo. 548; 64 id. 317; which shows an abandoned and malignant heart—43 Cal. 350; 43 id. 556.

Murder in the perpetration of a felony—48 Cal. 94; 17 id. 389; 24 id. 17; 49 id. 563; 38 Ala. 213; 9 Met. 93; 118 Mass. 36; 7 Tex. Ct. App. 472; as arson, burglary, rape, or robbery—24 Cal. 17; 34 id. 211; 49 id. 563; 1 Tex. Ct. App. 591; 2 id. 369. In robbery—49 Cal. 563. Attempt at rape—18 Hun. 457. Nor is it necessary that the party himself should inflict the mortal wound, if he be present aiding and abetting the act—1 Gall. 624; 1 Ired. 76.

Murder in the second degree is the unlawful killing, with malice aforethought, but without deliberation, premeditation, or preconceived design to kill—39 Cal. 694; 75 Pa. St. 403; S. C. 1 Am. Cr. R. 262. All murder not of the first degree is of the second degree—6 Baxt. (Tenn.) 610. If there was no deliberate preconceived intention, excepting that implied from circumstances showing no considerable provocation, nor an abandoned and malignant heart, or if he did not intend to produce death, yet intended the blow, it is murder in the second degree—25 Cal. 361. If circumstances of malice and premeditation are not proved, the law presumes the murder in the second degree—54 Mo. 153. The court should not charge, that, killing being proved, the law implies that it was willful, deliberate, and premeditated, and in

the first degree, and thus ignore evidence tending to show mitigating or extenuating circumstances, or to show homicide, justifiable or excusable—45 Cal. 291.

190. Every person guilty of murder in the first degree, shall suffer death or confinement in the State prison for life, at the discretion of the jury trying the same; or upon a plea of guilty, the court shall determine the same; and every person guilty of murder in the second degree, is punishable by imprisonment in the State prison not less than ten years. [In effect March 28th, 1874.]

Discretion.—Under the amendment of 1874, the duty imposed on the court is to exercise the same discretion when defendant pleads guilty, and the court finds the crime murder in the first degree, as is to be exercised by the jury when they find defendant guilty of murder in the first degree—49 Cal. 178. The nature of that discretion is to be ascertained from the language of the statute—*id.*

191. The rules of the common law, distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished, and these offenses are homicides, punishable in the manner prescribed by this chapter.

192. Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

1. Voluntary—upon a sudden quarrel or heat of passion.
2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

Manslaughter defined.—3 Wash. C. C. 515; 2 Horr. & T. 2; 1 Hayw. (N. C.) 429; 6 Eng. 455. The absence of malice distinguishes it from murder—5 Cal. 127; 6 *id.* 543; 40 *id.* 436; 5 Sawy. 620; 3 Gratt. 594; Wright, 20; Addis. 279; 5 Cowen, 51; 4 Dall. 125; 2 Rice, 104; 2 Va. Cas. 78; 1 *id.* 716; 2 Wheel. C. C. 506; Horr. & T. 2; 43 Me. 11; 1 Strob. 479; 16 B. Mon. 587; 1 Zab. 196; 37 Ill. 448; 3 Jones, (N. C.) 226; 28 Miss. 687; 59 Pa. St. 9; 10 Rich. 341; 31 Ind. 511; 43 Ala. 21; 18 Ga. 17; 29 Ohio St. 186; Kelly, 124; 2 St. Tri. 730. Neither malice nor deliberation is essential to unlawful shooting—5 Cush. 295; 7 Ga. 2; 2 Halst. 220; 1 Kelly, 222; Meigs, 106; 1 Parker Cr. R. 154; Thach. C. C. 471; 2 Va. Cas. 78; 1 *id.* 116; 53 Ga. 309. The unnecessary killing of another while resisting an attempt to commit a felony, or some other unlawful act—52 Miss. 23; or, if in the prosecution of a design no more was intended than a mere civil trespass, or an assault and battery—23 Ga. 200; 4 Mass. 391; 102 *id.* 155; 103 *id.* 458; 3 Cush. 181; 1 Leach, 6; or an attempt to commit a misdemeanor—33 Me. 49; 20 N. H. 160; 32 Me. 369. Where the weapon used is not likely to kill or maim—1 Raym. Ld. 144; 7 Humph. 479; 1 Ired. 76; or, where the act was not likely to cause death—30 Mich. 16; S. C. 1 Am. Cr. L. 276. Unless the unlawful act of

violence was felonious, the killing is manslaughter—20 N. H. 160; 32 Me. 369; 1 Raym. Ld. 144. The intent to kill is not a necessary ingredient in manslaughter—10 Ohio, 424. Where two fight on fair terms, and one, in the heat of passion, kills the other, it is manslaughter—9 Ired. 423; and the slayer need not be without fault—10 Bush, 495; S. C. 1 Am. Cr. R. 293; unless there was an intent to kill or perpetrate a felony—30 Mich. 16; S. C. 1 Am. Cr. R. 276.

Voluntary manslaughter is the unlawful killing done by design, while involuntary manslaughter is that done without design or intent to kill—53 Ind. 159; 28 Ga. 215—and in which there can be no aiders and abettors—65 Ind. 565. As where the killing is done intentionally, in hot blood, but without malice—2 Curt. 1; 2 Humph. 181; Horr. & T. 2; 7 Tex. Ct. App. 350; 46 Ga. 153; 15 Ohio St. 47; 58 Pa. St. 1; 47 Ill. 376; 32 Vt. 491; 16 Ark. 568; 30 Ind. 197; 66 id. 190; 31 id. 511; 37 id. 432; 42 id. 354; 50 id. 15; 51 id. 453; 54 id. 128; 123 Mass. 422; and the use of a superior weapon is no evidence of malice—31 Cal. 367; or, where it is voluntarily committed—17 Ala. 587; 36 id. 285. In New York, it must have been committed without a design to effect death, except in aiding a suicide, or killing an unborn child—7 N. Y. 385. On a mutual design to fight, where no advantage is taken and death ensues, it is voluntary manslaughter—24 Cal. 17; 26 id. 665; 49 id. 425; 9 Ired. 429; 65 N. C. 490; 52 Miss. 23; 53 Ala. 268; 4 Tex. Ct. App. 637. In a sudden mutual combat, where neither takes advantage of the other, and death ensues, it is manslaughter—4 Tex. Ct. App. 54; id. 637.

Killing in heat of passion.—To reduce murder to manslaughter, a provocation must be established apparently sufficient to render the passion irresistible—6 Cal. 96; 18 Ga. 17; 20 id. 71. If not done in the heat of passion it cannot be reduced to manslaughter—49 Cal. 171. It is enough that the passions are heated by the acts or conduct of deceased, and this may be caused by words, if naturally calculated to produce it—22 Miss. 383; 23 Ala. 44; as an assault and battery causing pain and bloodshed—5 Tex. Ct. App. 661; 1 Hawk. P. C. ch. 13, § 39; or an attack met with disproportionate violence—4 Dev. & B. 491; or killing in resisting an unlawful arrest—14 Mo. 133; id. 409; 4 Mass. 391; 26 Ala. 31; 12 Cush. 246; 69 Ill. 111; or in an attempt to gain one's liberty from an unlawful arrest—4 Tex. Ct. App. 349. Whipping one's child would be sufficient, if accused was suddenly aroused so as to be incapable of cool reflection—25 Tex. 698; see 57 Ga. 478. The law requires two things: first, there should be provocation; and second, the blow must be clearly traced to the passion arising therefrom—7 Car. & P. 817. See Desty's Crim. Law, title MANSLAUGHTER.

Provocation.—No provocation can justify or excuse homicide, but may reduce it to manslaughter—12 Nev. 300; 11 id. 88; when from the weapon used, or the nature of the attack, an intention to kill is manifest—2 Hill, (S. C.) 453; 5 Cush. 395; 1 Parker Cr. R. 154; 1 Ired. 354; 18 Ala. 720. The provocation must be such as would stir the resentment of a reasonable man—52 Ala. 348; 55 id. 413; and injury done to husband, wife, child, parent, master, or servant, is sufficient to reduce killing to manslaughter—8 Mich. 150; 3 Gratt. 594; 32 Ga. 496. In general the provocation must be one that involves some assault by the person killed—15 Ga. 244; and it makes no difference whether it could be prevented or not—24 Ala. 67; 23 Miss. 322; 4 Mich. 67. See Desty's Crim. Law, title MANSLAUGHTER.

Words and gestures.—Neither words of reproach, however grievous, nor insulting gestures or actions, are adequate provocation, or sufficient to reduce intentional homicide to manslaughter—6 Cal. 96; 8 id. 435; 50 id. 470; 25 Ala. 57; 48 id. 180; 6 Blackf. 299; 65 Barb. 48; S. C. 1 Green C. R. 714; 5 Cush. 295; 14 B. Mon. 614; 2 Dev. 269; 15 Ga. 223; 45 id. 198; 49 id. 211; 55 id. 317; 1 Hawks, 210; 3 Heisk. 376; S. C. 1 Green C. R. 238; 9 Met. 93; 10 Minn. 223; 25 Miss. 383; 38 Mo. 270; 65 id. 574; 11 Nev. 98; 76 N. C. 20; 4 Nev. 265; 12 id. 300; 5 Sawy. 620; 27 Tex. 758; 2

Tex. Ct. App. 93; 7 Id. 456; 30 Wis. 216; 3 Wash. C. C. 515. Killing on such provocation is murder—35 Ga. 59; Id. 158; 53 Id. 317; 2 Dev. 269; 1 Va. Cas. 10; 25 Ala. 57; but if on the instant he strikes with an instrument not likely to cause death, and death ensues, it is manslaughter—25 Up. Can. Q. B. 112. So where words of contumely are followed by mutual blows, and death ensues, it is manslaughter—2 Curt. 1; 4 Dall. 125; 39 Iowa, 185; 65 N. C. 430. So where the words were accompanied by injury done to defendant's property, it was held sufficient—16 Ark. 568; 15 Ga. 244. Insulting words and conduct to a female relative are not sufficient, unless the killing was really on that provocation, and ensued immediately thereupon—5 Tex. Ct. App. 2.

Cooling time.—If sufficient time elapse between the quarrel and the going out to fight to allow the blood to cool, the killing will be murder and not manslaughter—24 Cal. 17; 26 Id. 665; 63 Ind. 548; as where hours before the fight arrangements were made for it—4 Parker Cr. R. 514; 7 N. Y. 396; 3 Gratt. 535; 4 Dev. & B. 491; 17 Mo. 544; 25 Ga. 307; 1 Leigh, 613; 6 Car. & P. 157. A sudden heat of passion will not excuse, if the killing be done after a sufficient time has elapsed for reason to resume its sway—49 Ga. 482; 7 N. Y. 396. What constitutes sufficient cooling time is a question of law—69 N. C. 267; S. C. 1 Green C. R. 611. Where there has been sufficient cooling time, the killing is murder—44 Miss. 762; 4 Dev. & B. 491.

Threats against life.—Mere threats against life, or to do great bodily harm, will not reduce killing to manslaughter—6 Pac. C. L. J. 882; 47 Miss. 318; S. C. 1 Green C. R. 601; 6 Baxt. (Tenn.) 452; 5 Ga. 86; 15 Id. 244; 6 Tex. Ct. App. 578. They must be followed by words or overt acts at the time of the killing—17 Cal. 316; 3 Helsk. 376; 20 Iowa, 569; 24 Ala. 67; 47 Miss. 318; 6 La. An. 554; 14 Id. 570; Id. 827; or some demonstration made to carry out the threatened purpose, manifesting a present intention to carry it out—17 Cal. 316; 45 Id. 260; 47 Miss. 318; 24 Ala. 67; 3 Helsk. 376; S. C. 1 Green C. R. 255; 27 Tex. 758; 33 Id. 431; Id. 525; 31 Id. 420; 24 Tex. 454; 2 Head, 217; 44 Miss. 762; 12 Tex. 462; 5 Yerg. 459.

In preventing trespass.—To kill a mere trespasser is at least manslaughter, and, if not done in hot blood, it is murder—17 Ala. 588; 23 Id. 28; 26 Id. 31; 24 Id. 67; 59 Id. 1; 59 Ga. 35; 2 Cranch C. C. 439; 3 Ired. 186; 17 Iowa, 144; 14 Jones, (N. C.) 19; 4 Mass. 391; 20 Iowa, 569; 8 Jones, (N. C.) 463; 4 Mich. 67; 10 Minn. 223; 23 Miss. 322; 4 Parker Cr. R. 35; 1 Lew. C. C. 162; 1 Car. & P. 319. If the weapon, and manner of using it, were not likely to kill, it is manslaughter—4 Mass. 391; 59 Ala. 1; 23 Id. 28; 24 Id. 21; 3 Ired. 186; 8 Smedes & M. 401; 17 Iowa, 138; Cro. Car. 131. The killing of a trespasser by the use of spring-guns is manslaughter—14 Conn. 1; 31 Id. 479; and where they are planted with intent to kill, and no due notice is given, it is murder—59 Ala. 1. The common-law rule does not obtain in America—59 Ala. 1; 2 Peters, 144. The owner of property may resist with as much force as necessary to prevent the illegal removal of his property, or his exclusion from its use—8 Cal. 341; 14 Conn. 1; 1 Hill, 336; S. C. 4 Id. 434; 7 Met. 596; 8 Pick. 133; 24 Wend. 369; 77 Ill. 25; but this right extends only to prevention—43 Cal. 447; 23 Ala. 28; 18 Mich. 314; 1 Lew. C. C. 9.

Involuntary manslaughter is the accidental taking of life in the prosecution of some unlawful act not felonious, or in the improper performance of some lawful act—1 Cold. 62; 23 Iowa, 154; 6 Mass. 134; 7 Ga. 2. In case of accidents, as in sports productive of danger—8 Car. & P. 844; 6 Id. 103; as killing an antagonist with a chance blow—12 Cox C. C. 624; or by riding an unruly horse in a crowd—1 Cold. 62; or throwing a stone, or firing into a street—Whart. on Hom. § 158; or on shooting a gun only to alarm—2 Dev. 58; or, if a blow intended for one kills another—31 Ga. 167; 7 Car. & P. 438; or, striking a horse which shies, and a child is run over and killed—33 Me. 49; or in a scuffle where a fire-arm is accidentally discharged—22 Ga. 487; 65 Ind. 545; 1 Post. & F.

351; 4 id. 731; or during a fray where some one was accidentally killed by some one co-operating—6 Baxt. (Tenn.) 595. See 5 Jones, (N.C.) 423. So, killing contrary to intention, in the sudden heat of passion, with a weapon not calculated to produce death—108 Mass. 458; 14 Gratt. 613; as beating with a bludgeon, without intent to kill—28 Ga. 215; or, administering a kick—30 Mich. 16; S. C. 1 Am. Cr. R. 276; or, a master killing a servant under correction—25 Ga. 510.

By negligence.—When an act is negligent, and it results in death, it is manslaughter; as in permitting wild beasts to go at large—7 Ala. 169; or in exposing poison—10 Cox C. C. 486; 9 Car. & P. 356; or in a political meeting in a drunken quarrel—17 Ga. 174; or in frightening an infant—12 Cox C. C. 530; or in the immoderate correction of a child—61 N. C. 1; or by giving a child spirituous liquors—3 Car. & P. 211; 1 id. 246. So, where an act resulting in death is done recklessly or heedlessly, it is manslaughter; as by administering laudanum to an infant—11 Humph. 150; or in the use of dangerous machinery—Whart. on Hom. § 155; or dangerous agencies—1 Fost. & F. 519; id. 521; 10 Cox C. C. 486; or in pursuing another with a pistol in sport—39 Ga. 31; 41 id. 505; or in firing a gun recklessly and heedlessly—17 Iowa, 138; but a careful use of a dangerous article is not necessarily unlawful—11 Humph. 159; 2 Lea, (Tenn.) 239; 2 Humph. 457. In the use of a revolver, a person is held only to the care of a reasonable man—47 Iowa, 647; S. C. 2 Am. Cr. R. 326.

By negligence of omission.—An act of omission, as well as an act of commission, may subject a person to indictment for manslaughter—see 4 Savy. 517; 9 Bush, 669; 4 Cox C. C. 449; S. C. 1 Lead. C. C. 60; as leaving an engine in charge of an incompetent person—4 Cox C. C. 449; S. C. 1 Lead. C. C. 60; 2 Car. & K. 368; Dears. & B. 248; so of neglect to ventilate a mine—2 Car. & K. 368; or to place a stage at the mouth of a shaft—Dears. & B. 248; or neglecting to signal a railroad train—3 Cox C. C. 191; or leaving rails on a track—4 Fost. & F. 504; 1 Cox C. C. 352; 3 id. 191; or from gross negligence of a railroad company—108 Mass. 7; or of an officer of a steamboat—5 McLean, 242; 3 Blatchf. 528; 2 Fost. & F. 133; or by burning of a steamer while racing—1 Parker Cr. R. 659. So if death ensues from neglect or omission of a plain personal duty—1 Car. & K. 600; 2 id. 371; but not if it be a discretionary duty—17 Q. B. 34. In the neglect or omission of a duty, if there be malice, it is murder—8 Iowa, 477; 32 N. J. L. 169.

Neglect to provide food, etc.—Where death ensues from neglect or omission of duties owed by persons, it is manslaughter—8 Iowa, 477; 22 N. J. L. 169; 1 Car. & K. 600; 2 id. 371; Whart. on Hom. § 117; as neglect of parents, guardians, and others, to provide food and shelter for those under their care—3 Fost. (N. H.) 355; but the existence of a positive duty is essential—9 Cox C. C. 123; and means and ability to provide must be shown—5 Cox C. C. 379; 7 Car. & P. 277; 5 Cox C. C. 275; id. 339; 10 id. 547; id. 569. So where a husband neglects to provide food, etc., for his wife—3 Jones (N. C.) 421; 1 Car. & K. 600; or a master for his servant—13 Week. R. 816; 1 Up. Can. L. J. N. S. 164; 5 Cox C. C. 279; 8 Car. & P. 153; 10 Cox C. C. 62; 5 id. 279; 3 id. 303; or of a parent for his child—Russ. & R. C. C. 20; 9 Cox C. C. 123; 2 Car. & K. 864; 8 id. 133; 2 Camp. 650. Keepers of almshouses are responsible for death caused by their neglect—2 Strange, 682; 2 East P. C. 821; 8 Q. B. 959; Leigh & C. 394; 2 Car. & K. 343. Accepting guardianship of another makes one responsible for death resulting from negligence—7 Car. & P. 277; 6 Cox C. C. 140; 2 Den. C. C. 325; id. 277. And in all cases of neglect to provide food, etc., if the neglect to provide was willful and gross, and death ensues, it is murder—10 Cox C. C. 547; id. 569; 4 id. 455. See Desty's Crim. Law, § 7 a.

Negligence of medical practitioner.—Killing caused by gross negligence, rashness, carelessness, or ignorance of medical practitioners, apothecaries, etc. is manslaughter—10 Bush, 495; 21 Ala. 300; 2

id. 275; 1 Car. & K. 600; so if a patient dies for want of ordinary skill in the physician—9 Ired. 440; see also, 5 Car. & P. 333; 1 Moody C. C. 346; 4 Car. & P. 398; 3 id. 635; 8 id. 475; 3 Car. & K. 202; 4 Fost. & F. 356; 10 Cox C. C. 486; id. 525; 12 id. 534. See Desty's Crim. Law, § 7 a.

193. Manslaughter is punishable by imprisonment in the State prison not exceeding ten years.

194. To make the killing either murder or manslaughter, it is requisite that the party die within a year and a day after the stroke received or the cause of death administered; in the computation of which the whole of the day on which the act was done shall be reckoned the first.

Within a year and a day—6 Cal. 267; id. 210; 1 Dev. 139; 66 Mo. 125; 41 Tex. 496. See 3 Inst. 53.

195. Homicide is excusable in the following cases:

1. When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner:

No one who fairly follows the rules of athletic sports can be held responsible for death accidentally resulting therefrom—Addis. 270.

Accident or misadventure.—Where accidental mischief results from the proper performance of a lawful act, the party is excused from all guilt—89 Mass. 541; 14 Gray, 592. The accidental taking of life must have been in doing some lawful act—23 Iowa, 154; 5 Cush. 306; 32 Conn. 75; 19 Ga. 103; 31 Ga. 167; 1 Lew. C. C. 161; or if unlawful, it must honestly and *bona fide* have been believed to be innocent—30 Ga. 383. Death resulting from throwing lumber from a building, due caution being used, is misadventure only—Kelyng, 40; S. C. 1 Lead. C. C. 50. So of deaths resulting from athletic sports, the rules of the game being fairly followed—Addis. 270. If a physician *bona fide* exercising his best skill to cure a patient, performs an operation under which the patient dies, it is misadventure only—3 Car. & P. 629; even though he acts with gross ignorance—6 Mass. 134; 8 Mo. 561; but see 22 Pa. St. 261.

196. Homicide is justifiable when committed by public officers, and those acting by their command in their aid and assistance, either—

1. In obedience to any judgment of a competent court; or,

2. When necessarily committed in overcoming actual

resistance to the execution of some legal process, or in the discharge of any other legal duty; or,

3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.

Subd. 1. Execution of malefactors.—The execution of malefactors is an act of necessity where the law requires it, but the court issuing the warrant must have jurisdiction or it will be murder; otherwise if the warrant be merely informal—1 Hughes, 560; 1 Hill, (S. C.) 327; 50 Ala. 117; 32 Me. 369; 18 Ohio St. 298; Winst. 144; 2 Den. C. C. 35. A subaltern can justify killing another only on the ground of orders from his superior, which are lawful—1 Woods, 480.

Subd. 2. Officers of the law—when their authority to arrest or imprison is resisted, may use force against force, even if death should be the consequence—1 Hughes, 560; 18 Ohio St. 298; Winst. 144; 1 Hill (S. C.) 327; 50 Ala. 117; but not when the resistance is over and the necessity has ceased—see 50 Ala. 117. Even in case of a civil arrest, if the lives of the arresting party are put in jeopardy—1 Hill, (S. C.) 327. Except in cases of riot, an officer is not authorized to kill a party, accused of a misdemeanor, if he fly from arrest—2 Houst. 585; 44 Tex. 128; 12 Cox C. C. 4.

Killing by an officer of a felon, to prevent his escape, is justifiable—2 Strange, 882; 2 Ld. Raym. 1574; 2 Car. & K. 343; Leigh & C. 394; 9 Cox C. C. 449; 8 Q. B. 959; but if he can be taken without such severity, it is at least manslaughter—7 Car. & P. 153; 1d. 156; 2 Abb. U. S. 280; 44 Tex. 645; so, of a lawful arrest unlawfully executed—see 52 N. H. 492; 34 Conn. 132; 1 Vent. 216.

Subd. 3. On an arrest.—An officer is justified in killing one accused of felony if he resists and flees—1 Hawks, 456; 2 Den. C. C. 35; but necessity alone will justify the killing, and the authority to arrest must have been known—44 Ala. 41. The slayer must show a felony committed, and the object avowed, and a refusal to submit—2 Dev. 58. Killing by officers in routs, riots, and unlawful assemblies, if necessary to arrest offenders, is justifiable—8 Mich. 150. See 27 Cal. 572.

197. Homicide is also justifiable when committed by any person in either of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,

2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,

3. When committed in the lawful defense of such per-

son, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,

4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

Subd. 1. In prevention of a felony.—The taking of life is justifiable when done to prevent the commission of a felony—3 Wash. C. C. 515; see 1 Hawks, 78, 457; 2 Dev. 53; 17 Ala. 587; 25 Id. 15; 9 Iowa, 188; Thach. C. C. 471; 8 Mich. 150; 45 N. Y. 213; 5 Sawy. 620. There must be a well-grounded belief that a felony is about to be committed—1 Hawks, 457; 1 Jones, (N. C.) 190; 8 Mich. 150; 25 Gratt. 887; which can be prevented only by the killing of the supposed felon—8 Mich. 150; 17 Ala. 487; 25 Id. 15; Cro. Car. 538.

Subd. 2. Defense of habitation.—The use of fatal means of defense must be necessary to protect the life of defendant or of his family, or to protect from great bodily harm—45 Vt. 308; S. C. 1 Green C. R. 490. Taking of life is justifiable only when the entry is made in a violent, riotous, or tumultuous manner, for the purpose of offering violence to some person therein, or of committing a felony by violence—43 Cal. 447; S. C. 1 Green C. R. 487; and any inmate of the house may be justified—43 Cal. 447; S. C. 1 Green C. R. 487; 4 Mass. 391; 4 Hill, 437; 4 Lans. 119; 8 Mich. 150; 21 Ind. 23; 22 Ga. 478; Cro. Car. 544; 5 Coke, 92; 11 Mod. 242. To justify shooting a burglar there must be circumstances calculated to arouse the fear of a reasonable man, or indicating a danger so urgent as to excuse the instantaneous use of a deadly weapon—43 Cal. 447; S. C. 1 Green C. R. 487; 22 Ga. 478. Where several persons in a threatening manner assemble before a man's house, he must first warn them off, but if they advance and actually strike him, he will be justified in taking life—14 Up. Can. Q. B. 434. So if two persons come in the night-time and actually do violence, he will be justified—39 Ill. 407. See 78 N. C. 515.

Subd. 3. Defense of family.—Self-defense will justify a person in defending those with whom he is associated, and in killing if he believes life is in danger—49 Iowa, 328. The danger must be sufficient to satisfy a reasonable mind that his life, or that of his wife or children, was in peril—23 Ill. 17. The rule of self-defense extends to husband and wife, parent and child, brother and sister, master and servant—18 Ga. 704; 17 Ala. 587; 8 Mich. 150; 35 Ind. 492; 56 Id. 123; 30 Miss. 619; 19 Ohio St. 387; 1 Wis. 165. The rule applies to killing to prevent taking away defendant's children—17 Ala. 537.

Subd. 4. Arrest by private person.—If no felony has been committed, a private person in coming to the aid of the officer arresting will not be justified in killing—1 East P. C. 297.

Self-defense.—Killing is always justifiable if done in defense of life—3 Minn. 270; 3 Brev. 515; Horr & T. 2; or on an assault with felonious

intent—1 Ohio St. 66; Horr & T. 2; Thach. C. C. 471; 5 Ga. 85; 8 Mich. 150. A man has a right to defend himself against a sudden and unexpected assault, but he is not therefore justified in slaying his assailant—6 Pac. C. L. J. 594; 60 Ala. 441; he has no right to slay his assailant unless it be absolutely necessary, *id.* Homicide can be justified on the ground of necessity alone—1 Coxe, (N. J.) 424; 25 Tex. 174; 14 Bush, 341; 23 Iowa, 154; 3 Wash. C. C. 515; 1 Met. 451; 4 Dev. & B. 481; 90 Ill. 221; and the necessity must be apparent, actual, and imminent—33 Ala. 380; 14 Bush, 341; *id.* 363; 58 Pa. St. 1; and absolute—90 Ill. 221; 22 Ga. 234; with no possible or probable means of escaping the necessity to kill to save life, or save from great bodily injury—58 Pa. St. 1; 38 *id.* 265. It must be an imperious necessity—8 Cal. 390; 17 Ala. 587; 16 Ill. 17; 77 Ill. 484; or such apparent necessity as would impress a reasonable, prudent man that it existed—59 Ala. 1.

The danger.—To justify killing, the defendant must have been in real or apparent danger—10 Bush, 495; S. C. 1 Am. Cr. R. 293; imminent and immediate—33 Ala. 380; Horr & T. 2; 37 Miss. 327; 3 Wash. C. C. 515; 25 Ga. 701; *id.* 209; 5 Sawy. 620; 52 Miss. 23; existing at the time of striking the fatal blow—41 N. Y. 360. It is not necessary that the danger should in fact exist; actual and real danger to the defendant's comprehension as a reasonable man, is sufficient—31 Cal. 357; 44 *id.* 65; 10 Bush, 495; S. C. 1 Am. Cr. R. 293; 47 Ill. 376; 9 Nev. 106; *id.* 58; *id.* 120; 23 Ala. 17; 18 B. Mon. 49; 2 Curt. 1; 13 Kan. 414; 77 Ill. 484; a belief of imminent danger is sufficient—84 Pa. St. 158; 2 Am. Cr. R. 284. His guilt must depend on the circumstances as they appeared to him at the time—77 Ill. 25; and if he had reasonable ground for apprehension, even though appearances were false, the killing will be justifiable—44 Cal. 65; 46 Barb. 625; 4 Parker Cr. R. 35; 3 Heisk. 376; S. C. 1 Green C. R. 255. See 47 Mo. 604; 50 *id.* 357; 8 Mich. 150; 18 *id.* 314; 25 *id.* 405; 84 Pa. St. 158; S. C. 2 Am. Cr. R. 284; 10 Bush, 495; S. C. 1 Am. Cr. R. 293; 2 Wright, 265; 32 Conn. 75. See Desty's Crim. Law, § 31 b. As to duty to avoid danger, see Desty's Crim. Law, DOCTRINE OF RETREAT, § 31 c.

198. A bare fear of the commission of any of the offenses mentioned in subdivisions two and three of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

Fear.—A bare fear, grounded on threats, is not a justification for homicide, and nervous fears are no excuse—37 Miss. 327; 44 *id.* 731; Horr & T. 2; 44 Miss. 762; 8 Bush, 481; S. C. 1 Green C. R. 613; 10 Minn. 223; 31 Ga. 167; 39 *id.* 718; 2 N. Y. 193. The criminal law requires of men mastery over their fears as well as over their passions—24 Ind. 151. The fear, to excuse, must not only be well grounded, but must be honestly entertained—2 Head. 217; 24 Ind. 151; the fear of a reasonable man with a reasonable cause therefor—30 Cal. 312; 43 *id.* 450; 25 *id.* 217; 57 *id.* 184; 22 *id.* 76; 18 *id.* 708; 2 N. Y. 193; 25 Tex. 174; 3 Heisk. 376; 4 Ired. 469; 2 Barb. 168; 1 Hill, 420; 20 Iowa, 109; 8 Mich. 150; 26 Miss. 302; 5 Yerg. 459. Weakness of mind, fear, and excitement of defendant produced by the violence of deceased, will not alone justify—8 Cal. 390; 17 Cal. 316; see 43 *id.* 450. See Desty's Crim. Law, title HOMICIDE.

199. The homicide appearing to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged.

CHAPTER II.

MAYHEM.

§ 203. Mayhem defined.

§ 204. Mayhem, how punishable.

203. Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem. [Approved March 30th, in effect July 1st, 1874.]

Offense under statute.—The statutory offense covers all malicious disabling of the person—3 Conn. 112; 25 Ala. 30; 11 Bush, 603; 60 Mo. 141; 50 N. Y. 598; 63 id. 207; 25 Ohio St. 395; 4 Oreg. 324; 6 Serg. & R. 224. It consists in depriving a human being of a limb or member of his body, and rendering him defective in bodily vigor, whatever means or instrument may be used—4 Ark. 56; and disfigurement of person is sufficient—10 Ala. 928; maliciously and designedly in pursuance of a purpose formed during the conflict—3 Ala. 497; 49 id. 18; as, putting out an eye—7 Humph. 161; 3 Alb. L. J. 140; or, biting off part of an ear—1 Ired. 121; 7 id. 39. As to common-law offense—see Desty's Crim. Law, title MAYHEM.

204. Mayhem is punishable by imprisonment in the State prison not exceeding fourteen years.

CHAPTER III.

KIDNAPPING.

§ 207. Kidnapping defined.

§ 208. Punishment of kidnapping.

207. Every person who forcibly steals, takes, or arrests any person in this State, and carries him into another country, State, or county, or who forcibly takes or arrests any person, with a design to take him out of this State, without having established a claim according to the laws of the United States, or of this State, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this State, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent of such persuaded person, is guilty of kidnapping.

Kidnapping defined.—It is the unlawful removal, stealing, or carrying away of a person from his own State or country, against his will—see 2 Bish. C. L. 6th ed. § 752; 4 Bl. Com. 219; Bouv. Law Dic.; Jacob's Law Dic.; Bell's Dic. Transportation to a foreign country is not necessary—3 N. H. 550. The offense is complete although the ship be not in fact destined to leave the State—15 Cal. 332. Procuring the intoxication of a sailor, with the design to ship him, is sufficient—25 N. Y. 372.

Abduction of children.—In California, under an earlier statute, the abduction must be accompanied with a removal into another county, State, or Territory; but under a later statute, an intent to conceal or detain is the gist of the offense—15 Cal. 332. A child, taken by the father from the legal custody of its mother, must be deemed to be taken without her consent—41 N. H. 53. The forcible taking away a child, against the will of its father, is an assault, though both the child and its mother consent—5 Allen, 518.

208. Kidnapping is punishable by imprisonment in the State prison not less than one nor more than ten years.

CHAPTER IV.

ROBBERY.

- § 211. Robbery defined.
- § 212. What fear may be an element in robbery.
- § 213. Punishment of robbery.

211. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

Requisites of offense.—The property taken should belong to a person other than the defendant—21 Cal. 344; where title is *bona fide* claimed by the defendant the case falls—28 Ark. 126; 3 Car. & P. 409. The taking must be from the person, or in the presence of the party robbed—3 Wash. C. C. 209; 4 Binn. 379; 1 Ohio St. 422; 11 Humph. 167; 3 Cold. 350; 39 Ga. 563; 8 Car. & P. 49; 2 East P. C. 708. If force is used, fear is not an essential ingredient—4 Binn. 379; 7 Ired. 239; 7 Mass. 242; 55 N. H. 152; 73 N. C. 83; 35 Ind. 460; 5 R. I. 60. So, to knock a man down, and, while insensible, to take his property from him, is robbery—1 Leach, 320. There must be a taking, and carrying away—1 Leach, 362.

The taking.—The goods must be taken *animo furandi*, as in larceny—12 Ga. 293; 3 Hun, 114; 4 Ohio St. 539; 41 Iowa, 200; 71 N. C. 56. It includes larceny, and under the indictment the defendant may be found guilty of larceny—53 Cal. 58. The taking must be against the will of the owner—Phill. (N. C.) 140; 12 Ga. 293; Fost. 121-8; and, "if without" or "against" the will of the owner, is convertible with "without his consent," as, where the owner was insensible at the time—3 Car. & P. 392; 1 Leach, 320; or, when he was helpless—4 Binn. 379; but, if without force, or intent to use force, it is not robbery—25 Ind. 403.

212. The fear mentioned in the last section may be either—

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his, or member of his family; or,
2. The fear of an immediate and unlawful injury to the person or property of any one in the company of the person robbed at the time of the robbery. [Approved March 30th, in effect July 1st, 1874.]

Threats and fear.—If the goods be taken either by violence or putting in fear, it is sufficient—58 Mo. 581; 59 Id. 318; 8 Smedes & M. 401. Fear of bodily hurt is enough—1 Leach, 320. When fear is alleged

in the indictment it must be proved—6 Bush, 436, and this will be sufficient without actual force—1 Duvall, 150; 68 Mo. 581. Any threat calculated to produce terror is sufficient—12 Ga. 293; 2 East P. C. 734; as threatening to take and destroy one's child—2 East P. C. 734; or threatening to destroy one's house—2 East P. C. 731; or threatening to charge one with an unnatural crime—12 Ga. 293; 7 Humph. 45; 1 Leach, 139; Id. 193; Russ. & R. 146; Moody C. C. 261; even where the fear is only as to loss of character—1 Parker Cr. R. 199; 1 Leach, 278; Russ. & R. 375; 2 East P. C. 231.

213. Robbery is punishable by imprisonment in the State prison not less than one year.

CHAPTER V.

ATTEMPTS TO KILL.

§ 216. Administering poison.

§ 217. Assault with intent to commit murder.

216. Every person who, with intent to kill, administers, or causes or procures to be administered, to another, any poison or other noxious or destructive substance or liquid, but by which death is not caused, is punishable by imprisonment in the State prison not less than ten years.

Administering poison.—Poison means any substance which by its own inherent qualities is capable of destroying life. "Noxious or destructive substance or liquid," includes substances which act on the system mechanically, so as to destroy life—53 Cal. 147. Where defendant was charged with administering a large quantity of a certain deadly poison called red oxide of mercury, is sufficient charge under section—54 Cal. 54.

217. Every person who assaults another, with intent to commit murder, is punishable by imprisonment in the State prison not less than one nor more than fourteen years.

Assault with intent to murder.—Every ingredient of murder except death, must be present—52 Ga. 88; S. C. 1 Am. Cr. R. 246. It is the intent unlawfully and maliciously to kill which constitutes the offense—49 Miss. 17; S. C. 1 Am. Cr. R. 249; 25 Mo. 338; the intent is an essential ingredient—18 Cal. 636; 37 Ga. 31; 33 Ala. 413; and must be a specific felonious intent—53 Ala. 29; 49 Miss. 17; S. C. 1 Am. Cr. R. 249; 3 Helsk. 420; S. C. 1 Green C. R. 696; existing at the time of the assault—3 Tex. Ct. App. 316; 1d. 470. Malice is an essential ingredient, but not malice in fact—18 Cal. 636; 45 Ala. 43; 51 Ga. 402. If A., intending to murder B., shoots C., supposing C. to be B., and wounds C., he is guilty of assault with intent to murder—38 Cal. 141. An assault with intent to murder is a felony, and is so made by statute—12 Ala. 458; 3 Colo. 68; 15 Fla. 635; 6 Baxt. (Tenn.) 580; see 4 Parker Cr. R. 187. It includes an aggravated assault—60 Ala. 441; 4 Tex. Ct. App. 140; 6 Mich. 287; 5 Parker Cr. R. 102; or assault with a deadly weapon, with intent to do bodily harm—49 Cal. 226; S. C. 1 Am. Cr. R. 539; 5 Cal. 134; 30 id. 217; or an assault and battery, or a common assault—51 Iowa, 72; 60 Ala. 441; 29 Mo. 419; 18 Ala. 432; 28 id. 693; 50 id. 391; 33 Mich. 300; S. C. 1 Am. Cr. R. 244; 2 Allen, (N. B.) 14; 24 Up. Can. C. P. 106; and a party charged with this offense may be convicted of a lesser offense—44 Cal. 94; 59 Ala. 1; 58 Ind. 293; 2 Tex. Ct. App. 84; 3 id. 138; as, of an assault with a deadly weapon, and the verdict be for a misdemeanor only—5 Cal. 134; 6 id. 562; 30 id. 218; 40 id. 427; 44 id. 581; 49 id. 229; 8 Nev. 312; see 45 Cal. 282. See *post*, § 245.

Conspiracy to kill—see 52 Cal. 251.

CHAPTER VI.

ASSAULTS WITH INTENT TO COMMIT FELONY, OTHER THAN
ASSAULTS WITH INTENT TO MURDER.

§ 220. Assault with intent to commit rape.

§ 221. Other assaults.

§ 222. Administering stupefying drugs.

220. Every person who assaults another with intent to commit rape, the infamous crime against nature, mayhem, robbery, or grand larceny, is punishable by imprisonment in the State prison not less than one nor more than fourteen years.

Assault to commit rape.—An assault implies force and resistance, so there can be no assault on a consenting female—47 Cal. 450; 11 Nev. 23; S. C. 21 Am. Rep. 754; 32 N. Y. 528; 54 Ala. 158; 9 Car. & P. 215; 10 Cox C. C. 114; 12 id. 180. There must be actual attempt with force, and against the consent of the female—30 Ala. 54; 22 Wis. 580; but the charge may be sustained when the person assailed was incapable of giving consent, as from infancy—76 N. C. 209; Law R. 2 C. C. 10; see 11 Nev. 255; or from idiocy or mania—26 Up. Can. Q. B. 323; or where acquiescence was procured by fraud—3 Ark. 360; 53 Ala. 453; 29 Ark. 116; 32 id. 704; 11 Ga. 225; 50 Barb. 144; 14 Gray. 415; 47 Iowa. 151; 4 Leigh. 648; 23 Mich. 356; 12 Ohio St. 466; 22 Wis. 580; 45 id. 86; Law R. 1 C. C. 156; 1d. 2 C. C. 10; 8 Car. & P. 286; 1 Car. & K. 415; 4 Post. & F. 567; see 2 Cox C. C. 443. See Desty's Crim. Law, title RAPE. In case of young girls it is sufficient if their persons were indecently interfered with without their assent—18 Hun. 330; 13 id. 418; 1 Hill. 351; and even resistance is no defense when the defendant is a schoolmaster, and the person assailed is his pupil—Russ. & R. 130; 6 Cox C. C. 64; 9 Car. & P. 722; or where a medical practitioner unnecessarily strips a female patient—1 Moody C. C. 19.

Liability of parties.—All persons present, aiding and assisting, are principals—24 Mich. 1; but they must aid and assist—45 Cal. 293; and either a boy under fourteen, or a husband, may be liable as aiding and abetting—id.; 24 Mich. 1; 2 Allen, 163; 12 Mod. 340; 8 Car. & P. 736; see 74 Mass. 489. A person cannot be convicted on the uncorroborated testimony of the woman—51 Cal. 371; S. C. 2 Am. Cr. R. 590; 46 Cal. 540; 6 id. 221; 44 Iowa, 82. But see 29 Conn. 389. An indictment charging this offense need not strictly follow the language of the statute; words conveying the same meaning may be employed—53 Cal. 629; it need not allege that the force and violence was against her resistance. If there is no resistance, or resistance of an equivocal character, the conviction will be set aside—47 Cal. 450.

Assault with intent to rob.—Whether the intent was to rob, is in the province of the jury to determine—48 Cal. 82.

Assault with intent to maim.—An intent to maim is necessary—52 Ala. 391.

221. Every person who is guilty of an assault, with intent to commit any felony, except an assault with intent to commit murder, the punishment for which assault is not prescribed by the preceding section, is punishable by imprisonment in the State prison not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both.

Assault with intent to commit felony.—The perpetration of an assault, with intent to commit a felony, is a felony—2 Blackf. 5; 69 Me. 181. But see 4 Mass. 439; and a person may be indicted for an assault and battery with intent to commit a felony—8 Blackf. 575; 23 Ind. 150; 27 id. 15; 53 id. 354; 17 N. H. 253; 16 Ind. 232; 29 id. 80; 34 id. 543; 17 Up. Can. C. P. 139. There is no material difference between an assault with intent and an assault with an attempt to commit a crime—14 Ga. 55; 32 Ind. 220. See 14 Ala. 411.

222. Every person guilty of administering to another any chloroform, ether, laudanum, or other narcotic, anæsthetic, or intoxicating agent, with intent thereby to enable or assist himself or any other person to commit a felony, is guilty of felony.

Administering drugs, with intent to influence the passions, is an assault—114 Mass. 303; 5 Mich. 10. See 1 Wheel. C. C. 490.

CHAPTER VII.

DUELS AND CHALLENGES.

§ 225. Duel defined.

§ 226. Punishment for fighting a duel, when death ensues.

§ 227. Punishment for fighting a duel, although death does not ensue.

§ 228. Persons fighting duels, etc., disqualified from holding office, etc.

§ 229. Posting for not fighting.

§ 230. Duties of officers to prevent duels.

§ 231. Leaving the State with intent to evade laws against dueling.

§ 232. Witness' privilege.

225. A duel is any combat with deadly weapons, fought between two or more persons, by previous agreement or upon a previous quarrel.

Duel defined.—An agreement to fight with loaded pistols, and actually fighting in pursuance of the same, is a duel—1 Blackf. 377; 5 Strob. 33; 8 Humph. 84; 4 Yerg. 143; 5 id. 356. The *gravamen* of the offense is consent; if that took place in this State, the statute offense is complete—38 Ala. 352. If fought in presence of spectators, it is an aggravated affray—see 1 Russ. Cr. 9th ed. § 406. In California, fighting a duel without fatal result is a specific offense—14 Cal. 651. See 9 Leigh, 665.

226. Every person guilty of fighting any duel, from which death ensues within a year and a day, is punishable by imprisonment in the State prison not less than one nor more than seven years.

When death ensues.—In case of deliberate dueling, if death ensues, it is murder—4 Dev. & B. 491; 44 Miss. 762; and consent will not excuse—31 Ga. 411; 17 Wend. 351. In California, it is a special offense—14 Cal. 651.

227. Every person who fights a duel, or who sends or accepts a challenge to fight a duel, is punishable by imprisonment in the State prison or in a county jail not exceeding one year. [Approved March 30th, in effect July 1st, 1874.]

228. Any citizen of this State who shall fight a duel with deadly weapons, or send or accept a challenge to fight a duel with deadly weapons, either within this State or out of it, or who shall act as second, or knowingly aid

or assist in any manner those thus offending, shall not be allowed to hold any office of profit, or to enjoy the right of suffrage, and shall be declared so disqualified in the judgment upon conviction. [In effect April 6th, 1880.]

Disqualifications.—A statute which provides that the offender shall be incapable of holding any office of honor, trust, or profit, is constitutional—20 Johns. 457; S. C. 3 Cowen, 636. See 10 Bush, 725; see Const. Cal. art. xx, § 2.

Challenging and accepting challenges—see Desty's Crim. Law, § 94 b.

Remedies by action for injuries arising from duelling—see Civ. Code, §§ 3347, 3348.

229. Every person who posts or publishes another for not fighting a duel, or for not sending or accepting a challenge to fight a duel, or who uses any reproachful or contemptuous language, verbal, written, or printed, to or concerning another, for not sending or accepting a challenge to fight a duel, or with intent to provoke a duel, is guilty of a misdemeanor.

230. Every judge, justice of the peace, sheriff, or other officer bound to preserve the public peace, who has knowledge of the intention on the part of any persons to fight a duel, and who does not exert his official authority to arrest the party and prevent the duel, is punishable by fine not exceeding one thousand dollars.

231. Every person who leaves this State with intent to evade any of the provisions of this chapter, and to commit any act out of this State such as is prohibited by this chapter, and who does any act, although out of this State, which would be punishable by such provisions if committed within this State, is punishable in the same manner as he would have been in case such act had been committed within this State.

232. No person shall be excused from testifying or answering any question upon any investigation or trial for a violation of either of the provisions of this chapter, upon the ground that his testimony might tend to convict him of a crime. But no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding.

CHAPTER VIII.

FALSE IMPRISONMENT.

§ 236. False imprisonment defined.

§ 237. False imprisonment, how punished.

236. False imprisonment is the unlawful violation of the personal liberty of another.

False imprisonment is any unlawful restraint of one's liberty by words and an array of force, without bolts or bars, in any locality whatever—7 *Humph.* 43; 81 *N. C.* 528; but there must be a detention of the person, and unlawfulness of the detention—13 *Fla.* 675; 8 *C. 1 Green C. R.* 723; and the detention will be presumed unlawful—5 *Tex. Ct. App.* 60. It is not necessary to be touched or actually arrested—*Bald.* 60; a detention through threats is sufficient—3 *Tex. Ct. App.* 108; as to stop a person, by threats, from proceeding on a highway—3 *Sneed*, 68; or to prevent a man from moving as he sees proper—7 *Humph.* 43; 3 *Tex. Ct. App.* 204; 1d. 108; 6 *Id.* 452; or to forcibly detain a person on the street—12 *Ark.* 43.

237. False imprisonment is punishable by fine not exceeding five thousand dollars, or by imprisonment in the county jail not more than one year, or both.

Punishment.—False imprisonment is a trespass—5 *McLean*, 267; 3 *Har. & McH.* 260; 2 *N. H.* 491; 5 *Wend.* 170; it is an assault, or an assault and battery—17 *Ala.* 540; and it is a misdemeanor—23 *Cal.* 153.

CHAPTER IX.

ASSAULT AND BATTERY.

- § 240. Assault defined.
- § 241. Assault, how punished.
- § 242. Battery defined.
- § 243. Battery, how punished.
- § 244. Assaults with caustic chemicals.
- § 245. Assaults with deadly weapons.

240. An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Assault defined.—An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another—2 Wash. C. C. 435; 52 Ala. 391; an apparent attempt by violence to do corporal hurt to another—1 Hill, 351; 1 Ired. 128; 3 id. 186; 110 Mass. 407; 114 Mass. 323; 6 Tex. Ct. App. 298; 1 Sneed, 606; 2 Wash. C. C. 435; 43 Tex. 576; 1 Car. & K. 530; a manifestation by acts of a present purpose to do unlawful violence on another—17 Up. Can. C. P. 139; an attempt to commit a battery—44 Tex. 43; S. C. 1 Am. Cr. R. 46; for where there is not an apparently real approaching injury, there is no assault—43 Ala. 354; 9 Allen, 280; 39 Miss. 521; Phill. (N. C.) 434; 34 Tex. 286. It is enough if the adaptation of the means to the end is apparent so as to impress alarm on persons of ordinary reason—43 Ala. 354; 45 id. 43; 32 Ind. 220; 81 N. C. 613; 41 Tex. 468; 28 Ga. 395; 5 Cush. 365; 26 Ga. 611; 65 N. C. 334. If apparent, leading another to suppose that he will do what he apparently attempts, it is sufficient—11 Vt. 236; 4 Car. & P. 349; as offering to strike, and rushing at one—27 Cal. 633; 1 Ired. 125; 11 Vt. 236; 63 N. C. 13; 65 id. 532; 11 Nev. 284; 4 Car. & P. 349; or assuming a threatening attitude, and the effect is to terrify—45 Ala. 43; 2 Humph. 457; 10 Iowa, 130; 110 Mass. 407; Phill. (N. C.) 108; 32 Tex. 593; 41 id. 401; 9 Car. & P. 483; as, pointing a gun or pistol at another—2 Humph. 457; 10 Iowa, 126; 11 Ired. 975; 8 Ind. 524; 5 Allen, 507; 110 Mass. 407; whether loaded or not—2 Humph. 457; 33 Ala. 413. There may be an assault without personal injury—19 Iowa, 517; as where he fails to commit the injury intended—29 Tex. 494; as shooting at another—28 Ga. 395; 29 id. 723; 36 id. 424; 49 id. 306; raising a stick near enough to strike—35 Ala. 363; although the attack was frustrated or intercepted—27 Cal. 633; 20 Kan. 311; 1 Ired. 121; 65 N. C. 532; 4 Car. & P. 349. It may be committed on one or more by the same act—Phill. (N. C.) 134; 34 Tex. 95; but it must be done on a person and not on an animal near such person—18 Cal. 636.

Instances of assaults—see Desty's Crim. Law, title ASSAULT. Where there was no intent to injure, there can be no conviction—8 Cal. 547; 2 Wash. C. C. 435.

Intent.—There must be an intent to strike—27 Cal. 633; 9 Ala. 79; 34 id. 363; 6 Tex. Ct. App. 465; and an attempt to do so—27 Cal. 633; 9 Ala. 79; 18 id. 547; 34 id. 363. The criminal act and intent must concur, but if it is apparent that he will act it is sufficient, though he be

prevented—18 Cal. 636; 19 Ark. 190; 9 Humph. 457; 3 Ired. 186; 11 id. 475; 9 Ala. 79; 32 Ind. 220; 11 Vt. 236; 3 Sneed, 66; 4 Car. & P. 349; by dodging or running away—27 Cal. 633; 9 Allen, 274; 36 Ind. 280; 45 Ala. 43; or by the intervention of another—27 Cal. 633; 9 Allen, 274; 36 Ind. 280; 45 Ala. 43; 11 Vt. 236; 17 Up. Can. C. P. 139; which act if not prevented would produce a battery—30 Ala. 14; 1 Humph. 394; 1 Ired. 125; id. 375; 32 N. Y. 525; 23 Tex. 574; 33 id. 517; 1 Serg. & R. 347; 1 Sneed, 606. See Desty's Crim. Law, title ASSAULT.

What not an assault.—Mere words will not constitute an assault—1 Bay, 351; 32 N. Y. 525; 30 Wis. 313; 33 Tex. 517; but they may be received in evidence to show the intent—65 N. C. 334; see 1 Serg. & R. 346; and if they accompany an act showing an intent not to commit violence, the act is not an assault; as a threatening act accompanied by the word "if"—9 Allen, 79; 1 Ired. 125; 1 Serg. & R. 347; 1 Sneed, 606; 22 Ga. 237; 3 Ired. 186; 1 id. 375; 9 Car. & P. 626; 1 Mod. 3. Menacing words and threatening gestures must be accompanied with an ability to inflict the injury threatened—27 Cal. 633; 39 Miss. 521; 4 Eng. 42; 59 Ala. 1; 32 Tex. 593; 2 Tex. Ct. App. 244; 6 id. 465; 18 Ala. 547; 9 id. 79; 34 id. 363; 44 Tex. 43; S. C. 1 Am. Cr. R. 46.

241. An assault is punishable by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding three months.

Judgment.—The party may be imprisoned for the fine, but not for the costs—45 Cal. 245.

242. A battery is any willful and unlawful use of force or violence upon the person of another.

Battery defined.—A battery is an unlawful touching of the person by an aggressor, or by any substance put in motion by him—43 Ind. 146; 23 Up. Can. Q. B. 619; an unlawful and unjustifiable use of violence, however slight—1 Gray, 61; S. C. 1 Lead. C. C. 295; 2 Met. 24; 6 Tex. Ct. App. 465; if done without consent of the person—Law Rep. 1 C. C. 243; id. 12; 26 Up. Can. Q. B. 320. It is the slightest unlawful touching, willfully or in anger—Bald. 571; 43 Ind. 146; 17 Tex. 515; 15 Hun. 293. "Person" includes wearing apparel, or a cane held in the hand, or a house in which the person resides—1 Hill, (S. C.) 46.

Assault and battery.—Where two persons mutually fight by agreement, each is equally guilty of a several and distinct offense—19 Ark. 577; 40 Ind. 18; 119 Mass. 350; S. C. 1 Am. Cr. R. 59; Phill. (N. C.) 237; 7 Gray, 324; but see 14 Ohio St. 437; 6 Dana, 295; 1 Hill (S. C.) 363; there must be mutual intent, but there need not be mutual blows—46 Ga. 148; carelessly firing a pistol at another and hitting him—5 Allen, 507; 34 Ind. 63; or threatening another, and putting his open hand on him and pushing him back—65 N. C. 332; or freeing another from arrest—33 Ind. 531; 11 id. 47; 5 Ind. 527; or the hirer of a convict inflicting personal chastisement—51 Ala. 33; or the performance of sexual intercourse in a brutal manner—58 Ind. 355; or riding over another with a horse—3 Strob. 137; or driving a horse against a carriage, thereby causing injury—1 Wheel. C. C. 363; 1 Serg. & R. 347; or forcibly removing a person from where he has a right to be—124 Mass. 284; or pushing a person against another—43 Ind. 146; or sprinkling paint from a window upon a passer-by—1 Wheel. C. C. 62; or stabbing another—15 Ga. 117; 36 id. 91; 31 id. 411; 25 id. 396; or striking the cane in a person's hand, or pulling his coat in a rude and insulting manner—1 Dall. 114; 1 Hill, (S. C.) 46; 4 Denio, 453; 4 Miss. 534; or taking and detaining a person against his consent—17 Ala. 540; or resisting an officer having a prisoner in custody—5 Met. 536; 6 Gray, 350; or inciting another to strike an officer—99 Mass. 433; or false imprisonment and riotous acts

—17 Ala. 540; 10 Minn. 409; or bringing on an affray—78 N. C. 431; or attempting to retake money, fraudulently gotten, from him—6 Baxt. (Tenn.) 608; or, without a warrant, attempting to arrest a fugitive, is an assault and battery—79 N. C. 605.

What not assault and battery.—Where one, in doing a lawful act, accidentally injures another—1 Strange, 190; or where one injures another in friendly athletic sport—11 N. H. 540; or snatching from a person's hand—12 Cush. 270; or arresting a man apparently intoxicated; it is not an assault and battery—14 Gray, 65; 123 Mass. 436.

Enforcing discipline.—The master of a vessel may chastise a seaman moderately—1 Ware, 83; id. 506; 2 Story, 120; 2 Sum. 584; see 4 Mason, 505; 7 Ben. 355. An officer on duty may correct in moderation—75 N. C. 249; 43 Tex. 93; 1 Tex. Ct. App. 664; as the superintendent of a poor-house—58 Ind. 516; S. C. 2 Am Cr. R. 176; 34 Conn. 132.

Parent and child, etc.—Every parent may chastise his child in moderation—2 Humph. 283; 121 Mass. 66; 1 Brewst. 311; 54 Ga. 281; 3 Head, 455; 52 Ill. 395; 62 id. 354; 13 Iowa, 485; see 6 Tex. Ct. App. 133. So as to guardians—43 Tex. 167; or persons *in loco parentis*—68 N. C. 322; 63 id. 1; so as to teachers—2 Dev. & B. 365; 4 Ind. 290; 4 id. 632; 1 City H. Rec. 52; 4 Gray, 362; 68 N. C. 322; 62 Ill. 354; 45 Iowa, 248; 5 Pa. L. J. 78; 40 Barb. 541; 27 Vt. 755; 3 Head, 455. A master who stands *in loco parentis* may chastise his apprentice moderately—Addis. 324; 2 Pa. St. 402; 1 Ashm. 267; 6 Tex. Ct. App. 133; 1 Wheel. C. C. 155. A teacher is guilty of assault and battery in excessively chastising a pupil—4 Gray, 36; 8 Low. Can. Jur. 173; a master has no right to whip a hired servant—1 Ashm. 267; 10 Conn. 457; 6 Tex. Ct. App. 133; 2 Chit. 195.

243. A battery is punishable by fine of not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both. [Approved February 26th, 1881.]

Punishment.—An assault without a deadly weapon is a misdemeanor only—45 Cal. 233; 6 Id. 563.

244. Every person who willfully and maliciously places or throws, or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of such person, is punishable by imprisonment in the State prison not less than one nor more than fourteen years.

245. Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the State prison, or in a county jail, not exceeding two years, or by fine not exceeding five thousand dollars, or by both. [Approved March 30th, in effect July 1st, 1874.]

Assault with deadly weapon.—An assault with intent not to do murder, but a lesser bodily harm, is not a felony, unless resort is had to means of a deadly nature—45 Cal. 283; 6 id. 562; 42 Ill. 340. "To do bodily harm on a person," and "to inflict on the person of another a bodily injury," are of the same import—44 Cal. 94, distinguishing 9 id. 260. It is a distinct offense from an assault to do murder, but is necessarily included in that charge in the indictment—44 Cal. 94; 5 id. 133; 40 id. 426. See 30 Cal. 218. The indictment should charge the offense in the language of the statute, and should allege that the weapon was deadly, or such facts as necessarily show that it was deadly—29 Cal. 579. An averment that defendant was armed with a deadly weapon, and made an assault, is not an averment that the assault was made with a deadly weapon—52 Cal. 451. The name of the weapon is not a necessary ingredient, its nature alone is important—44 Cal. 94. See 6 Cal. 562. Where defendant was convicted and was sentenced to imprisonment in the county jail, no appeal lies from the judgment—53 Cal. 428.

Offense generally.—The danger to life must be a real danger—2 Curt. 241. A deadly weapon is one calculated to produce death, or great bodily harm—6 Tex. Ct. App. 146; 3 id. 13; as a bowie-knife—24 Ga. 286; a pistol used as a bludgeon—41 id. 155; weights and stones—23 id. 79; 30 id. 138; a champagne bottle—33 id. 217; or one which, in the manner used, is capable of producing death or great bodily harm—4 Tex. Ct. App. 327; see 1 id. 640; 6 Jones, (N. C.) 505. An assault with a deadly weapon is *ipso facto* an aggravated assault—23 Tex. 582; 6 Tex. Ct. App. 663. To constitute an assault with a gun it is not necessary that it be raised to the shoulder—27 Mo. 255; but there must be an act indicative of an effort to shoot, or otherwise use the weapon—43 Tex. 576; 23 id. 574; 7 Tex. Ct. App. 77.

CHAPTER X.

LIBEL.

- § 248. Libel defined.
- § 249. Punishment of libel.
- § 250. Malice presumed.
- § 251. Truth may be given in evidence. Jury to determine law and fact.
- § 252. Publication defined.
- § 253. Liability of editors and publishers.
- § 254. Publishing a true report of public official proceedings privileged.
- § 255. Extent of privilege.
- § 256. Other privileged communications.
- § 257. Threatening to publish libel. Offer to prevent publication, with intent to extort money.

248. A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule. [Approved March 30th, in effect July 1st, 1874.]

Libel in general.—Libel is an offense under the law both of England and of the States of the Union—17 Mass. 336; 13 Met. 68; 9 N. H. 34. It is a representation in writing or by pictures, calculated to lead to any act which, when done, is indictable—4 Mass. 163; 4 McCord, 317; 9 Johns. 214. Any publication which tends to excite people to the commission of any crime is a libel—Stark. Slan. § 152. A malicious publication in printing, writing, signs, or pictures, tending to injure reputation, disgrace and degrade a person, and lower him in the esteem of the world, or bring him into public hatred, contempt, or ridicule—5 Har. (Del.) 475; 3 id. 406; 2 id. 417. Intent is an essential element—15 Pick. 337; 7 Cowen, 613; Peake Ad. Cas. 84; 2 Barn. & C. 257; and the party will be presumed to intend the consequences of his act—see 4 Ga. 14; 15 Pick. 337; 22 How. St. Tri. 237; 2 Barn. & C. 257; 9 Car. & P. 462.

249. Every person who willfully, and with a malicious intent to injure another, publishes, or procures to be published, any libel, is punishable by fine not exceeding five

thousand dollars, or imprisonment in the county jail not exceeding one year.

250. An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

Malice in law.—On the intentional publication by another of matter which is libelous, malice in law will be implied, whatever the motives in fact may be—3 Pick. 304; 9 Met. 410; 15 Pick. 337; 7 Cowen, 613.

251. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury have the right to determine the law and the fact.

Justification.—To constitute a justification, the answer must aver the truth of the publication—9 Cal. 536; 43 Id. 379; 2 Hill, 248; 9 Met. 410; 15 Pick. 337; 7 Ired. 180; but if the libel assert the defamatory matter only as the belief of the author, or as rumor, or general suspicion, it cannot be justified by proof that the author believed it to be true—41 Cal. 380; 4 Conn. 408; 8 Wend. 606; 11 Price, 235; 1 Holt, 53; 6 Bing. 215. But proof that he believed it to be true may be admitted in mitigation of punishment—9 Ala. 447; 4 Man. & R. 65; 4 Barn. & Ald. 314.

252. To sustain a charge of publishing a libel, it is not needful that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel, under circumstances which exposed it to be read or seen by any other person than himself.

Publication defined.—The offense is committed by sending the libel to the one libeled, though it reaches the ear of no third person—7 Conn. 228; 2 Yerg. 581. The transmission of a sealed letter containing libelous matter is indictable—5 Humph. 112; 6 Ga. 276.

253. Each author, editor, and proprietor of any book, newspaper, or serial publication, is chargeable with the publication of any words contained in any part of such book, or number of such newspaper or serial.

Liberty of the press.—Every citizen has the right of investigating the conduct of those who are intrusted with public business—1 Dall. 25; being responsible for the abuse of that liberty—3 Yeates, 520; 4 Id. 269; 3 Pittsb. Rep. 449. The guarantee of freedom of speech applies to words spoken or published in regard to judicial conduct or character—79 Ill. 45. See Const. Cal. art. I, sec. 9. Not only the liberty of the press must be preserved, but liberty of written as well as oral discourse in all relations where there is a duty to speak, and if what is

written under such a duty goes no further than duty demands, it is not indictable unless express malice is shown; otherwise if it goes beyond the line of duty—2 Bosw. 537; 1 Denio, 41; 6 Gray, 94; 21 How. 202; 13 Md. 95; 9 N. H. 34; 12 Pick. 163; 9 Phila. 594; Law R. 9 C. P. 393; 7 El. & B. 229. The editor is answerable in law if the contents of his paper are libelous, unless the matter was inserted by some one without his order and against his will—Thach. C. C. 346.

254. No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication.

Reports of official proceedings.—Where a report of judicial proceedings, though accurate, is accompanied by comments and insinuations to asperse a man's character, it is libelous—3 Pick. 304; 7 Johns. 264; see 2 Pick. 113; 1 Barn. & Ald. 379. Counsel are protected while they keep within what is material to the cause, but not when they overstep this bound—3 Smith J. P. 491; 2 Camp. 563; 5 Esp. 123; 1 Barn. & Ald. 379. Where upon a final trial of a cause the judge makes an order of court forbidding any publication of the proceedings, the publisher cannot shield himself from indictment on the ground that the libel was a correct report of what was done—see 9 Ala. 447; 1 Ld. Raym. 148; 4 Term. Rep. 285; Moody & M. 165.

255. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of their being so connected.

256. A communication made to a person interested in the communication, by one who was also interested, or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication.

Privileged communications.—Privileged communications are such as rebut the *prima facie* inference of malice, but this may be answered by proving malice in fact—20 Mass. 379; 2 Crompt. M. & R. 156. As communications to the executive or appointing power—5 Johns. 508; 1 Va. Cas. 176; 2 Wheel. C. C. 465; 3 Whart. 158; 3 Car. & P. 141. See 72 Mass. 261; 3 Pittsb. Rep. 449; 19 N. Y. 173; 9 Minn. 133; 1 Up. Can. Q. B. 211; 5 Id. 211; see 1 Up. Can. L. J. 156; or letters or reports in writing of public officers in the ordinary course of their duty—Law R. 5 Q. B. 103; id. 94; 5 Harl. & N. 838; 1 Esp. 226. So *bona fide* communications as to the character of candidates for office are privileged—3 Car. & P. 146; Moody & M. 187; 5 Scott, 349; Law R. 1 Q. B. 699; but see 21 How. 202. But libelous statements made to injure one in office, or a candidate for office, are not privileged—13 Abb. Pr. 41; 9 Minn. 138; 19 N. Y. 173. Confidential communications, by persons occupying fiduciary positions, as letters to employer, to inform of malpractice of employees—

1 Camp. 268; or of a master in giving a correct character of a servant upon inquiry made of him—3 Man. & R. 101; 4 Id. 338; 4 Burr. 2425; Bull N. P. 8; but otherwise, if false answers be given—4 Barn. & Adol. 700. Other privileged communications, see Desty's Crim. Law, title LIBEL.

257. Every person who threatens another to publish a libel concerning him, or any parent, husband, wife, or child of such person, or member of his family, and every person who offers to prevent the publication of any libel upon another person, with intent to extort any money or other valuable consideration from any person, is guilty of a misdemeanor.

TITLE IX.

Of Crimes against the Person and against Public Decency and Good Morals.

- CHAP. I. RAPE, ABDUCTION, CARNAL ABUSE OF CHILDREN, AND SEDUCTION, §§ 261-7.
- II. ABANDONMENT, AND NEGLECT OF CHILDREN, §§ 270-2.
- III. ABORTIONS, §§ 274-5.
- IV. CHILD-STEALING, § 278.
- V. BIGAMY, INCEST, AND THE CRIME AGAINST NATURE, §§ 281-7.
- VI. VIOLATING SEPULTURE AND THE REMAINS OF THE DEAD, §§ 290-7.
- VII. CRIMES AGAINST RELIGION AND CONSCIENCE, AND OTHER OFFENSES AGAINST GOOD MORALS, §§ 299-309.
- VIII. INDECENT EXPOSURE, OBSCENE EXHIBITIONS, BOOKS, AND PRINTS, AND BAWDY AND OTHER DISORDERLY HOUSES, §§ 311-18.
- IX. LOTTERIES, §§ 319-26.
- X. GAMING, §§ 330-6.
- XI. PAWNBROKERS, §§ 338-43.
- XII. OTHER INJURIES TO PERSONS, §§ 346-67.

CHAPTER I.

RAPE, ABDUCTION, CARNAL ABUSE OF CHILDREN, AND SEDUCTION.

- § 261. Rape defined.
- § 262. When physical ability must be proved.
- § 263. Penetration sufficient.
- § 264. Punishment of rape.
- § 265. Abduction of women.
- § 266. Seduction for purposes of prostitution.
- § 267. Abduction.

261. Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances:

1. Where the female is under the age of ten years.
2. Where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent.
3. Where she resists, but her resistance is overcome by force or violence.
4. Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution; or by any intoxicating, narcotic, or anæsthetic substance, administered by or with the privity of the accused.
5. Where she is, at the time, unconscious of the nature of the act, and this is known to the accused.
6. Where she submits, under a belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief.

Rape defined.—Rape is the unlawful carnal knowledge of a female, by force, without her consent—4 Bl. Com. 210; 2 Arch. C. Pr. 152; 1 East P. C. 434; of any woman above the age of ten years, unlawfully, against her will—12 Ark. 339; 11 Ga. 225; 39 Me. 22; 9 Mich. 150; 47 Miss. 609; 23 Wis. 364; without her consent, and against her will, are

synonymous—47 Cal. 447; 105 Mass. 376; see 110 *id.* 405; 53 Mo. 65; 36 Mich. 203; see Bell C. C. 71; that it was against her will may be inferred from the circumstances—35 Geo. 263. "Carnal knowledge" means sexual commerce—97 Mass. 59. A woman ceases to be a child when she reaches the age of puberty—22 Ohio St. 102; S. C. 1 Green C. R. 660.

262. No conviction for rape can be had against one who was under the age of fourteen years at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt.

Presumption of incapacity.—The presumption is, that a boy under fourteen years is incapable of committing rape—14 Ohio, 222; Winst. 300; 7 Jones, (N. C.) 61; 11 Ga. 225; 3 Car. & P. 396; 7 *id.* 582; 8 *id.* 736; 9 *id.* 118; but this presumption may be rebutted—2 Parker Cr. R. 174; 14 Ohio, 222. That the presumption is irrebuttable—see 4 Har. (Del.) 566; 7 Jones, (N. C.) 61; Winst. 300; 9 Car. & P. 366. A boy under fourteen may be liable as an aider and abettor—19 Mass. 380.

263. The essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration, however slight, is sufficient to complete the crime.

Female under ten years.—It is rape whether the carnal knowledge was with her consent or not—11 Ga. 225; 6 Tex. Ct. App. 525; 7 *id.* 342. The law conclusively presumes that a child under ten years is incapable of giving consent—14 Ired. 224; 56 Ga. 36; S. C. 2 Am. Cr. R. 589; 11 Ga. 325; 26 Up. Can. Q. B. 320. So consent of a child of tender years is no consent—29 Ark. 116; 11 Ga. 225; 4 Har. (Del.) 566; 1 Hill, 351; 12 Iowa, 66; 1 Leigh, 588; 9 Mich. 150; 76 N. C. 269; 12 Ohio St. 466; 17 *id.* 515; 26 Up. Can. Q. B. 323; 9 Car. & P. 213; 10 Cox C. C. 144; *id.* 157. So force is not necessary in case of a child under ten years—55 Ga. 303; 11 *id.* 226.

Carnal abuse of children.—Carnal knowledge of a child by her consent is not properly rape, although punished in the same manner—2 Va. Cas. 235; 47 Miss. 609; 25 Wis. 364. Force and resistance are not the essential elements—11 Nev. 255; 4 Cent. L. J. 525; 55 Ala. 264. Abuse is understood as limited to the genital organs in an attempt at carnal knowledge, falling short of penetration—58 Ala. 376.

Subd. 2. Incapacity to give consent through idioecy or mania—26 Up. Can. Q. B. 323.

Subd. 3. Force and resistance.—Force, actual or constructive, is a necessary ingredient—53 Cal. 62; 30 Ala. 54; 53 *id.* 453; 9 Fla. 163; 50 Barb. 144; 32 Ark. 704; 1 Wheel. C. C. 378. It is incident to the physical character of the act—35 Ga. 263. See 110 Mass. 455; 32 N. Y. 525; 3 Cox C. C. 543; even if she is a common strumpet, or a kept mistress of the ravisher—52 Ala. 394; 4 Humph. 194; 8 Eng. 360; 1 Hun, 307; 3 Car. & P. 589. No particular amount of force is necessary—2 Iowa, 566. See 52 Ind. 187; 59 N. Y. 374. The amount of force and resistance depend on the relative strength of the parties, and other circumstances—45 N. H. 148; 35 Ga. 263; 74 N. C. 425; 2 Tex. Ct. App. 346; 6 *id.* 524. There must be on the part of the female the utmost resistance—53 Mo. 65; 24 Mich. 1; see 110 Mass. 405; 49 Ga. 185; 1 Tex. Ct. App. 346; until she is exhausted or overpowered—59 N. Y. 374; her utmost resist-

ance according to her lights is sufficient—110 Mass. 405; 49 Ga. 155. See 32 Ind. 187; 83 N. Y. 374. Where the resistance was of such equivocal character as to suggest actual consent or a not decided opposition, a conviction cannot be sustained—47 Cal. 450.

Constructive force.—The force may be constructive—53 Ala. 453; S. C. 2 Am. Cr. R. 583; 36 Mich. 203; S. C. 2 Am. Cr. R. 585; as, where the woman, by means of drugs, liquors, etc., is rendered insensible—105 Mass. 376; 7 Conn. 54; 30 Ala. 54. See 54 Me. 24; 12 Cox C. C. 311; S. C. 1 Green C. R. 317; but see 4 Leigh, 648; 50 Barb. 123.

Subd. 4. Preventing resistance.—Ceasing resistance under fear of death or great bodily harm, makes the consummated act rape—3 Ala. 54; 13 Ark. 360; 21 Kan. 138; 2 Swan, 394; 4 Fost. & P. 967. The offense may be committed, though the woman at last yielded to the violence, if her consent was forced by fear of death, or by duress—33 Mich. 363; 4 Humph. 194; 9 Car. & P. 748. It is not necessary that she have a reasonable apprehension of death—40 Ala. 325; it is sufficient if she considered resistance dangerous, or absolutely useless—83 Mich. 363; 4 Humph. 194; 9 Car. & P. 748. The circumstances calculated to give effect to the violence or threats are to be considered on the question of duress—45 N. H. 148; 35 Me. 263; 74 N. C. 425; 2 Tex. Ct. App. 346. She must be quite overcome by fear and terror, with as much resistance as possible under the circumstances—16 Up. Can. C. P. 379. See 30 Ala. 54; 3 Ark. 360; 21 Kan. 138; 2 Swan, 394. It is a question for the jury to determine—9 Car. & P. 722; 6 Cox C. C. 64; 16 Up. Can. C. P. 379.

Administering drugs, with intent to inflame the passions, is an assault—114 Mass. 303; 6 Mich. 10; see 1 Wheel. C. C. 490; otherwise at common law—54 Ind. 128; 1 Cox C. C. 282; 2 Car. & K. 912.

Subd. 5. Unconscious submission during sleep is no consent—12 Cox C. C. 311; S. C. 1 Green C. R. 317; 35 Ga. 263; or, where she was intoxicated—54 Me. 24; 105 Mass. 376.

Subd. 6. Artifice and fraud.—Acquiescence by a married woman, mistaking defendant for her husband, is no defense—50 Barb. 144; Russ. & R. C. C. 487; S. C. 2 Lead. C. C. 254; as, where the act was stealthily committed, she being under such impression—7 Conn. 54. *Contra*, 2 Swan, 394; 30 Ala. 54; 76 N. C. 1. Where carnal knowledge was obtained under circumstances which induced the woman to suppose the defendant was her husband, it is not rape, was held in 105 Mass. 376; 1 Wheel. C. C. 378; 13 Ark. 360; 6 Eng. 389; 6 Cox C. C. 412; 4 Id. 223; 13 Up. Can. Q. B. 116; 11 Cox C. C. 191; 8 Car. & P. 265; but the party would be liable for an assault—8 Car. & P. 265; *id.* 256; 7 Jones, (N. C.) 61. See 3 Car. & P. 396.

Penetration.—When committed forcibly and against the consent of the female, proof of actual penetration is sufficient—40 Ala. 325. The slightest penetration is sufficient—Addis. 143; 3 Brev. 339; 40 Ala. 325; 11 Ga. 225; Phill. (N. C.) 231; 65 N. C. 466; 11 Serg. & R. 177; 1 Va. Cas. 30; 43 Tex. 189; *id.* 583; 1 Swin. 98; 23 Iowa, 397; disapproving 8 Jones, (N. C.) 179; see 25 Wis. 413; 1 Car. & K. 393; 9 Car. & P. 31; *id.* 118; and penetration may be inferred from circumstances—36 Cal. 522; 23 Iowa, 40; Phill. (N. C.) 231; 25 Wis. 413. It is not necessary that the hymen should be ruptured—5 Car. & P. 321; 8 *id.* 641; 9 *id.* 752; nor is emission necessary—Addis. 143; Phill. (N. C.) 231; 63 N. C. 7; 65 *id.* 466; 40 Ala. 325; 1 Va. Cas. 307; 22 Ohio St. 102.

264. Rape is punishable by imprisonment in the State prison not less than five years.

Punishment.—The punishment is the same, whether the act be done on a female over ten years or under that age—4 Gray, 7.

The offense is a felony—7 Tex. Ct. App. 372.

Liability of parties.—All persons present, aiding or assisting, are principals, but they must be actually aiding and assisting—45 Cal. 293; 24 Mich. 1; see 12 Bush, 18; 46 Iowa, 265; so a person standing by, but doing no act to aid or assist, is not guilty—45 Cal. 293. A person cannot be convicted on the uncorroborated testimony of the woman—51 Cal. 371; S. C. 2 Am. Cr. R. 590; 46 Cal. 540; 6 id. 221; 44 Iowa, 82; see 29 Conn. 389; but her testimony may be corroborated by her own prior statements—see Whart. Cr. Ev. § 273; 1 Whart. C. L. 8th ed. § 566.

265. Every person who takes any woman unlawfully, against her will, and by force, menace, or duress, compels her to marry him, or to marry any other person, or to be defiled, is punishable by imprisonment in the State prison not less than two nor more than fourteen years.

Abduction for marriage.—Abduction for marriage by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practices for the purpose of marriage, is an offense at common law—3 State Tr. 519; and physical force or violence is not essential—8 Iowa, 447; and consent extorted by threats, fraud, or otherwise, is no consent—20 Ill. 315; see 24 Tex. 133. If the female be under fifteen years of age, and without parents or legal guardian, those who have her under their care are deemed to have the legal custody of her—8 Iowa, 447; Stat. 1871-2, 380.

266. Every person who inveigles or entices any unmarried female, of previous chaste character, under the age of eighteen years, into any house of ill-fame or of assignation, or elsewhere, for the purpose of prostitution; or to have illicit carnal connection with any man; and every person who aids or assists in such inveiglement or enticement; and every person who, by any false pretenses, false representation, or other fraudulent means, procures any female to have illicit carnal connection with any man, is punishable by imprisonment in the State prison not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. [Approved March 30th, in effect July 1st, 1874.]

Abduction for purposes of prostitution.—The taking and detaining of an adult female, when not accomplished with violence, was not an offense at common law—5 Rand. 628; 3 Barb. 603. The gist of the statutory offense is the enticing and taking away—90 Ill. 274; 8 Cox C. C. 238. The intent must be to reduce the female to a condition of prostitution, or concubinage—90 Ill. 274; 8 Cox. C. C. 238; or of placing her in a house of ill-fame, or elsewhere, to be a prostitute—12 Met. 93. "Purpose of prostitution" means indiscriminate criminal intercourse with men—6 Parker Cr. R. 129; 8 Barb. 603; 8 Iowa, 447; 52 Ind. 526; S. C. 1 Am. Cr. R. 25; 54 Me. 24; an intention to obtain her for his own carnal enjoyment is not prostitution—1 Car. & M. 254; it is a distinct offense—49 Cal. 11; 12 Met. 93; mere seduction will not amount to the

offense—49 Cal. 11; 90 Ill. 274; see 54 Me. 24. A purpose of concubinage or of marriage will not be implied where the man is already married—6 Parker Cr. R. 129. Chaste character means personal virtue, chaste up to the commencement of the acts of defendant—8 Barb. 603; as distinguished from good repute—52 Ind. 426; 36 Cal. 1 Am. Cr. R. 23; 26 N. Y. 203; 32 Iowa, 88; 5 id. 339; id. 430. The prosecution must allege and prove the chaste character of the female—49 Cal. 10; and *prima facie* proof, by presumption from other facts, is sufficient—49 Cal. 10.

Seduction.—To seduce a female, is not an offense within section 266 of the Penal Code. This section refers to one who procures the gratification of the passion of lewdness in another—49 Cal. 11. Indecent liberties with females are acts classed as solicitations distinguishing seduction from rape—53 Cal. 62.

Adultery.—Proof of notoriety is as material as proof of the fact of adultery—46 Cal. 52.

Adultery at common law.—Adultery is the illicit commerce of two persons of the opposite sex, one of whom at least is married—6 Ala. 84; 1 Ashm. 269; 2 Blackf. 318; 6 Cusb. 178; 11 Ga. 53; 6 Gratt. 672; 2 Dall. 124; 58 Ill. 59; S. C. 1 Green C. R. 655; 22 Iowa, 364; 43 Me. 258; 36 id. 261; 2 Met. 190; S. C. 2 Lead. C. C. 29; 21 Pick. 509; 33 Pa. St. 68; 9 N. H. 515; 1 Pin. (Wis.) 91; 56 Ind. 263; 1 Har. (Del.) 389; 4 Minn. 335. The definition varies with the local statutes—7 Conn. 567; 9 N. H. 515; N. C. Term. Rep. 165; which follow the common law—2 Ball. 149; 5 Rand. 327; id. 634; 16 Vt. 551, and which follow the ecclesiastical law. See Desty's Crim. Law, § 88 a. The living together must be open and notorious—46 Cal. 52; 58 Ill. 59; S. C. 1 Green C. R. 655; 56 Mo. 147; 42 Miss. 334; 1 Mont. 359; S. C. 2 Am. Cr. R. 159. One act is not sufficient—46 Cal. 53; 14 Ala. 608; 13 Ill. 597; 58 id. 60; S. C. 1 Green C. R. 39 Ala. 554; 56 Me. 147; 37 Tex. 346; 1 Pin. (Wis.) 641. See Desty's Crim. Law, § 88 b.

See "Act to punish Seduction," 1872, Appendix, p. 716; and "Act to punish Adultery," 1872, Appendix, p. 714.

267. Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable by imprisonment in the State prison not exceeding five years, and a fine not exceeding one thousand dollars.

Abductions.—The child must be taken from some person having lawful charge of her—1 Russ. Cr. 9th ed. 940; and the taking must be without such person's consent—1 Car. & M. 254; 1 East P. C. 457; and want of consent will be presumed—see Rosc. Cr. Ev. 264. A person who takes a female under age from the custody of her father, must take the consequences, if she proves under age—2 Law R. C. C. 154; S. C. 1 Am. Cr. R. 1; 10 Cox C. C. 402; 1 Car. & K. 456; 12 Cox C. C. 28; id. 231; and that he *bona fide* believed, or had reason to believe, she was over age is no defense—2 Cr. Cas. Res. 154; S. C. 1 Am. Cr. R. 1. It is enough if she be persuaded to leave her home, and the control of the parent continues down to the time of the taking—6 Cox C. C. 143; 4 id. 167; 8 id. 446; and though she quitted the house on a proposition emanating from herself, with a statement that she intended to leave, it is sufficient—2 Cox C. C. 279.

PEN. CODE.—11.

CHAPTER II.

ABANDONMENT AND NEGLECT OF CHILDREN.

§ 270. Omitting to provide child with necessities.

§ 271. Deserting child.

§ 272. Disposing of child for mendicant business.

270. Every parent of any child who willfully omits, without lawful excuse, to perform any duty imposed upon him by law, to furnish necessary food, clothing, shelter, or medical attendance for such child, is guilty of a misdemeanor.

Duty of parents.—A father is penally responsible for a neglect to supply food and clothing to his child—23 N. H. 355; 1 Den. C. C. 366; 8 Car. & P. 611; 4 Cox C. C. 455; 5 id. 275; 10 id. 569; 3 Car. & K. 123; but if a parent has no means to support his child, his omission to do so is not indictable—8 Q. B. 959; 10 Cox C. C. 569; 12 id. 16; 5 id. 339. The conscientious error of judgment in matters of medical treatment is not punishable at common law—10 Cox C. C. 530; so a conscientious conviction that God would heal a sick child, may be a defense on negligence of parental duty—10 Cox C. C. 530. A mother is not criminally liable for neglect to provide a midwife for her daughter on confinement with a bastard child—9 Cox C. C. 123; unless there be a legal duty to supply one—9 Cox C. C. 123; 3 Aleyn, 132; and she must have taken exclusive charge—9 Cox C. C. 123; 7 Car. & P. 277; 8 id. 611.

See Civil Code, §§ 193-215, acts relating to abandoned children, 1874, Appendix, p. 726; 1878, for protection of children, Appendix, p. 732; 1878, mendicant business, Appendix, p. 733.

271. Every parent of any child under the age of six years, and every person to whom any such child has been confided for nurture or education, who deserts such child in any place whatever, with intent wholly to abandon it, is punishable by imprisonment in the State prison not exceeding seven years, or in a county jail not exceeding one year.

At common law.—To desert a helpless child with intent to kill is murder—2 Camp. 640; Car. & M. 164; 2 Car. & K. 864; 6 Cox C. C. 140; and manslaughter, if death ensues simply from the negligence—4 Cox C. C. 455; 2 Car. & K. 864; Dears. 453; 5 Cox C. C. 339; 10 id. 547; id. 569; 6 id. 140; 2 Camp. 640; and so of death from unjustifiable exposure to the weather—2 Car. & K. 784.

272. Any person, whether as parent, relative, guardian, employer, or otherwise, having in his care, custody,

or control, any child under the age of sixteen years, who shall sell, apprentice, give away, let out, or otherwise dispose of any such child to any person, under any name, title, or pretense, for the vocation, use, occupation, calling, service, or purpose of singing, playing on musical instruments, rope walking, dancing, begging, or peddling, in any public street or highway, or in any mendicant or wandering business whatsoever, and any person who shall take, receive, hire, employ, use, or have in custody, any child for such purposes, or either of them, is guilty of a misdemeanor. [In effect March 3d, 1876.]

CHAPTER III.

ABORTIONS.

- § 274. Administering drugs, etc., with intent to produce miscarriage.
 § 275. Submitting to an attempt to produce miscarriage.

274. Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years.

Abortion.—The offense may be committed at any time during the period of gestation—2 Ohio St. 319; 49 Iowa, 260; and the moment the womb is instinct with embryo life gestation has begun—15 Gray, 187; 9 Mass. 387; 13 Pa. St. 631; 6 Pa. L. J. 29; see 2 Zab. 58. The offense is committed when a person gives medicine to a woman to procure an abortion, whether the drug was likely to produce the abortion or not—22 Minn. 238; see 2 Ind. 617; and it is not necessary that he be present when the medicine is taken—1 Dears. & B. 127.

Any unlawful use of any instrument for the purpose of procuring an abortion, is criminal—39 Cal. 400; 13 Allen, 554; 103 Mass. 461; the intent to commit an abortion must exist, when the means are used; 76 Ill. 217; S. C. 1 Am. Cr. R. 29; the death of the woman is not a necessary ingredient, that of the child being sufficient to make the offense a felony—56 N. Y. 95; it only increases the degree of the crime and the punishment—1d. The evidence of the crime is usually drawn from the circumstances—76 Ill. 217; S. C. 1 Am. Cr. R. 29; 40 Md. 633; 121 Mass. 81; 123 id. 242; 125 id. 40; 12 Cox C. C. 463; S. C. 1 Green C. R. 142; a person cannot be convicted on the uncorroborated testimony of the woman alone—39 Cal. 398.

Miscarriage.—Administering to a pregnant woman any drugs, or employing any means to produce a miscarriage, unless necessary to preserve life, is a criminal offense—41 Ind. 303; 2 Camp. 76. To constitute an administering it is not necessary that there should be a delivery by hand—4 Car. & P. 369; but there must be an actual swallowing of the drug—Ryan & M. 114; *contra*, 23 Minn. 238. Proof of the clandestine manner of administering would tend to prove the intent—56 N. Y. 628; the fact that the substance would not produce a miscarriage is no defense if he employed it with a criminal intent—49 Ind. 260; 23 Minn. 238; and an attempt is indictable though the woman was not pregnant at the time—32 Vt. 380; 2 Ohio St. 319; 11 Gray, 85. See Desty's Crim. Law, § 66 c.

275. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than one nor more than five years.

See Act of 1890, relating to sale of poisonous substance, Appendix, p. 749.

CHAPTER IV.

CHILD STEALING.

§ 278. Definition and punishment of child stealing.

278. Every person who maliciously, forcibly, or fraudulently takes or entices away any child under the age of twelve years, with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child, is punishable by imprisonment in the State prison not exceeding ten years, or by imprisonment in a county jail not exceeding one year, and a fine not exceeding five hundred dollars.

CHAPTER V.

BIGAMY, INCEST, AND THE CRIME AGAINST NATURE.

- § 281. Bigamy defined.
- § 282. Exceptions.
- § 283. Punishment of bigamy.
- § 284. Marrying a husband or wife of another.
- § 285. Incest.
- § 286. Crime against nature.
- § 287. Penetration sufficient to complete the crime.

281. Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy.

Bigamy.—Bigamy is an offense against society—98 U. S. 145. Parties marrying under the legal age of consent, and cohabiting together after attaining legal age, cannot marry again while the first marriage exists—20 Ohio, 1. Such marriage is only voidable—55 Ala. 108; id. 162; and if the minor refuses to consent on arriving at legal age, and ceases to cohabit afterward, such minor may marry again—15 Mich. 193. A marriage contracted through fear may, under some circumstances, be void—44 Ala. 24. A marriage in fact in a foreign jurisdiction is *prima facie* evidence of a valid marriage—54 N. H. 456; S. C. 1 Am. Cr. R. 34. But if invalid where contracted, it is invalid here—31 Up. Can. Q. B. 182. Yet, a marriage which the law of the place may hold invalid, may, nevertheless, be deemed valid here—25 Wis. 370; 21 Gratt. 800. So it may be held valid though not solemnized by an ordained minister—25 N. Y. 390. It is a civil contract, and does not require the intervention of a clergyman or a magistrate to make it legal—2 Cal. 503; see Civ. Code, § 55; and no particular form is required—2 Cal. 503. An agreement before witnesses, and subsequent cohabitation, is sufficient—25 N. Y. 390.

Second marriages.—The gist of the offense is the entering into a void marriage while a valid one exists—25 N. Y. 390; 34 Mich. 339; S. C. 1 Am. Cr. R. 72; 1 Car. & K. 144; it is an indispensable element—55 Ala. 108; 59 id. 101; and must have been contracted in the State where the indictment is found—2 Parker Cr. R. 195; 1 Pick. 128; 8 id. 433; 113 Mass. 435; 44 Ala. 24; 59 id. 101; but by statute, a continuance in a bigamous state is made indictable wherever a second marriage may have been solemnized—18 Vt. 570; 2 Cush. 553; 3 Head, 544; 12 Minn. 476; 4 Thomp. & C. 77; 2 Parker Cr. R. 192; 5 Hun, 297; but see 32 Ark. 205; id. 565; 55 Ala. 108. The offense is complete when the second marriage is complete, without proof of cohabitation—55 Ala. 108; 81 Pa. St. 428; 2 Fed. 346; although such marriage is invalid by reason of some legal disability of the parties—34 Mich. 339; S. C. 1 Am. Cr. R. 72; 1 Car. & K. 144; but see 10 Cox C. C. 411; id. 474; as a marriage between a negro and a white person—34 Mich. 339; S. C. 1 Am. Cr. R. 72. When one goes through the form of marriage, those aiding and assisting are accessories at the fact—1 Car. & K. 144; see 34 Ga. 275. Ignorance of law

or the advice of a magistrate will not excuse from responsibility—36 N. J. L. 125; 11 Blatchf. 200; 1d. 374; 27 Mich. 191; 2 Met. 190; 9 Allen, 489; 97 Mass. 117; 98 id. 6. Ignorance of law is no defense when the statute makes the act indictable irrespective of guilty knowledge—68 Me. 30; S. C. 1 Am. Cr. R. 42; and a party cannot avail himself of good faith on the act—1d. 98 U. S. 145; 1 Utah, 226; 13 Bush, 318; S. C. 2 Am. Cr. R. 163.

282. The last section does not extend—

1. To any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five successive years, without being known to such person within that time to be living; nor,

2. To any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by the judgment of a competent court.

Subd. 1. Absence.—If the party knows the absentee beyond seas to be alive, the exception in the statute will not relieve—38 Miss. 313; and see 6 Allen, 591; 10 id. 196; 7 Cox C. C. 175. Being in another State of the Union is equivalent to being beyond seas—3 Wheat. 541; 14 Peters, 141; 10 Pick. 515; 1 Rawle, 373. See 34 Ga. 407; 50 Md. 161. In North Carolina, an absence of seven years, without knowledge of his being alive, is a defense—2 Ired. 346. In Massachusetts, the legality of the second marriage while the spouse is living does not depend on the ignorance of his being alive or on the honest belief of his death—7 Met. 472. In Pennsylvania, any false rumor circumstantial as to place, time, and mode of death, in appearance well founded, of the death of the other, absent for two years, is a defense—Whart. on Hom. 412.

Subd. 2. Divorce.—If a divorce be such as by the *lex fori* entitles one to marry again, he cannot be convicted of bigamy—43 Me. 258; 5 Barb. 117; 2 Clark & F. 567. To give validity to a divorce, the complainant at least must be domiciled in the State where it is granted—25 Mich. 247; see 126 Mass. 34; S. C. 2 Am. Cr. R. 612; 10 Mass. 260; 13 Gray, 209; 4 Allen, 134; 1 Johns. 424; 15 id. 121; 45 N. Y. 535; 32 Ga. 653. So, if a party go to a State merely to obtain a divorce, it is void—28 Ala. 12. In Massachusetts, the guilty party cannot marry again—126 Mass. 34; S. C. 2 Am. Cr. R. 612; 1 Pick. 136. He cannot marry a second wife a resident of the State—1 Pick. 136; 8 id. 433; 113 Mass. 458. But he may marry out of the State, unless he goes there to marry and evade the laws—113 Mass. 458; 8 Pick. 433; see 13 Ala. 570; 17 Pa. St. 240; 1 Yerg. 110; 1 Bish. Mar. and Div. § 306; 2 id. 701. If a decree be obtained before the second marriage, it is a good defense; otherwise, if obtained after the marriage—2 Hill, 325. An honest but erroneous belief that a divorce has been granted is no defense—13 Bush, 318; S. C. 2 Am. Cr. R. 163; 65 Me. 20. In Indiana, it is a good defense—46 Ind. 459; but see 50 id. 263. If the defense is divorce, the defendant must prove it—7 Allen 306.

283. Bigamy is punishable by fine not exceeding two thousand dollars, and by imprisonment in the State prison not exceeding three years.

284. Every person who knowingly and willfully marries the husband or wife of another, in any case in which such husband or wife would be punishable under the pro-

visions of this chapter, is punishable by fine not less than two thousand dollars, or by imprisonment in the State prison not exceeding three years.

285. Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the State prison not exceeding ten years.

Incest.—Incest is a statutory offense—14 Cal. 159; 1 Morris, 330; 2 Met. 193; 11 Ohio St. 328; 11 Ga. 53. It is a joint offense—49 Ind. 544; 8 C. 1 Am. Cr. R. 354. And the *lex fori* arbitrates as to the relationship—Whart. Conf. of L. § 136. In Iowa, intermarriage within the prohibited degrees is incest, without carnal knowledge—34 Iowa, 547. In Ohio, *emissio seminis* was once essential—22 Ohio St. 541; S. C. 1 Green C. R. 662; but elsewhere it was held not necessary—34 Iowa, 547. A bare solicitation is not indictable—32 Ill. 191; S. C. 2 Am. Cr. R. 329; 54 Pa. St. 209; 39 Mass. 476. In California, the attempt must be manifested by acts which would end in consummation, but for the intervention of circumstances, independent of the will of the party—14 Cal. 159. But sending for a magistrate is not an attempt to contract an incestuous marriage—14 Cal. 159.

Prohibited degrees.—Criminal intercourse with a daughter is incest—11 Ga. 53; and the offense may be committed with a natural as well as a legitimate daughter—11 Ala. 239; 30 id. 251. It is not incest for a man to cohabit with his step-daughter—47 Miss. 278; the relation of step-daughter and step-father ceases to exist on its termination by death or divorce—22 Ohio St. 541; S. C. 1 Green C. R. 662. Brother and sister mean the offspring of the same parents; they do not necessarily imply legitimacy of birth—34 Iowa, 547. See Desty's Crim. Law, § 58 a. See Civ. Code, § 59.

286. Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the State prison not less than five years.

Crime against nature.—Sodomy is the carnal knowledge committed against the order of nature by man with man, or by man with woman in an unnatural manner, or by man or woman with a beast—5 Parker Cr. R. 200. Consent or non-consent is immaterial—8 Car. & P. 604; 3 Cox C. C. 270; the party consenting being an accomplice—111 Mass. 411. See Rosc. Cr. Ev. 944; unless committed on a child under fourteen—1 Denison, 864; Law R. 2 C. C. 12. It is sexual connection *per anum*—Russ. & R. C. C. 331; see 1 Va. Cas. 307, with mankind or beast, but not with fowl—2 Whart. C. L. 8th ed. § 579. Attempts and assaults to commit the offense are indictable—3 Q. B. 180; 1 Moody C. C. 34; Law R. 2 C. C. 12; 8 Car. & P. 417.

287. Any sexual penetration, however slight, is sufficient to complete the crime against nature.

Penetration is essential to the offense—Russ. & R. C. C. 331; see 8 Car. & P. 604; and without emission it is sufficient—1 Va. Cas. 307; 3 Har. & J. 154.

CHAPTER VI.

VIOLATING SEPULTURE AND THE REMAINS OF THE DEAD.

- § 290. Unlawful mutilation or removal of dead bodies.
- § 291. Unlawful removal of dead body from grave for dissection, etc.
- § 292. Who are charged with the duty of burial.
- § 293. Punishment for omitting to bury.
- § 294. Who are entitled to custody of a body.
- § 295. Arresting or attaching a dead body.
- § 296. Defacing tombs and monuments.
- § 297. Unlawful interments.

290. Every person who mutilates, disinters, or removes from the place of sepulture the dead body of a human being without authority of law, is guilty of felony. But the provisions of this section do not apply to any person who removes the dead body of a relative or friend for reinterment.

Violation of sepulture.—It is a crime at common law to wantonly or illegally disturb a corpse—8 Pick. 370; 19 id. 304; 10 id. 37; 1 Leach, 497; Russ. & R. C. C. 367; 7 Cox C. C. 214; or to remove one—7 Cox C. C. 214. It is not necessary that all engaged should be actually present, provided they are near enough to render assistance—6 Blackf. 110. The wife loses all control over the body of her husband after its burial—42 Pa. St. 293.

291. Every person who removes any part of the dead body of a human being from any grave or other place where the same has been buried, or from any place where the same is deposited while awaiting burial, with intent to sell the same, or to dissect it, without authority of law, or from malice or wantonness, is punishable by imprisonment in the State prison not exceeding five years.

Body-snatching.—It is a crime to dig up and remove a dead body for gain or for dissection—4 Blackf. 328; 19 Pick. 304; 10 id. 37; Dowl. & R. 13; 1 Leach, 497; 8 Cox C. C. 18; or to sell a dead body for dissection—8 Cox C. C. 18.

292. The duty of burying the body of a deceased person devolves upon the persons hereinafter specified:

1. If the deceased was a married woman, the duty of burial devolves upon her husband.

2. If the deceased was not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age, and within this State, and possessed of sufficient means to defray the necessary expenses.

3. If the deceased left no husband nor kindred answering the foregoing description, the duty of burial devolves upon the coroner conducting an inquest upon the body of the deceased, if any such inquest is held; if there is none, then upon the persons charged with the support of the poor in the locality in which the death occurs.

4. In case the person upon whom the duty of burial is cast by the foregoing provisions omits to make such burial within a reasonable time, the duty devolves upon the person next specified; and if all omit to act, it devolves upon the tenant; or if there is no tenant, upon the owner of the premises, or master, or if there is no master upon the owner, of the vessel in which the death occurs or the body is found.

Duty of burial.—At common law, it is a misdemeanor for one, whose duty it is to have a dead body buried, to refuse or neglect to bury it—1 Me. 226, if he have sufficient means to do so—5 Cox C. C. 379; 2 Denison, 625; or to prevent the burial—Willes, 537; or to willfully obstruct and interrupt the burial service—4 Barn. & C. 902; 2 Strange, 426; or to bury a body of one who died a violent death before or without a coroner's inquest—1 Salk. 377; 7 Mod. 10; or to throw a dead body into a river without the rites of a christian burial—1 Me. 226. A statute, which empowers boards of health to regulate burial-grounds and interments, includes the removal of dead bodies—13 Allen, 546. The statute applies only to burial-places dedicated in the mode pointed out by statute—9 Ind. 172.

293. Every person upon whom the duty of making burial of the remains of a deceased person is imposed by law, who omits to perform that duty within a reasonable time, is guilty of a misdemeanor; and, in addition to the punishment prescribed therefor, is liable to pay to the person performing the duty in his stead, treble the expenses incurred by the latter in making the burial, to be recovered in a civil action.

294. The person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it; except that in the case in which an inquest is required by law to be held upon a dead body by a coroner, such coroner is entitled to its custody until such inquest has been completed.

295. Every person who arrests or attaches any dead body of a human being, upon any debt or demand whatever, or detains or claims to detain it for any debt or demand, or upon any pretended lien or charge, is guilty of a misdemeanor.

296. Every person who willfully and maliciously defaces, breaks, destroys, or removes any tomb, monument, or gravestone, erected to any deceased person, or any memento or memorial, or any ornamental plant, tree, or shrub, appertaining to the place of burial of a human being, or who shall mark, deface, injure, destroy, or remove any fence, post, rail, or wall of any cemetery or graveyard, is guilty of a misdemeanor.

Violation of sepulcher.—It is an offense at common law to deface tombs, monuments, graves, burial-lots, etc.—3 Coke Inst. 202; 2 Bish. C. L. 6th ed. § 1188. If a place has once acquired the character of a cemetery, it does not cease to have it by mere disuse—7 Allen, 299. See Pol. Code, §§ 3074-3082.

297. Every person who shall bury or inter, or cause to be buried or interred, the dead body of any human being, or any human remains, in any place within the corporate limits of any city or town in this State, or within the corporate limits of the city and county of San Francisco, except in a cemetery, or place of burial, now existing under the laws of this State, and in which interments have been made, or that is now or may hereafter be established or organized by the board of supervisors of the county, or city and county, in which such city or town, or city and county, is situate, shall be guilty of a misdemeanor. [In effect March 30th, 1874.]

CHAPTER VII.

OF CRIMES AGAINST RELIGION AND CONSCIENCE, AND OTHER
OFFENSES AGAINST GOOD MORALS.

- § 299. Sunday amusements, where liquors are sold.
- § 300. Keeping open places of business on Sunday.
- § 301. Limitation on operation of preceding section.
- § 302. Disturbing religious meetings.
- § 303. Sale of liquors at theaters, and employing women to sell liquors thereat.
- § 304. Selling liquors at camp-meeting.
- § 305. Limitation of preceding section.
- § 306. Females exhibited in public places.
- § 307. Keeping or resorting to place where opium is used.
- § 308. Admission of minor to place of prostitution.

299. Every person who, on the christian Sabbath, gets up, exhibits, opens, or maintains, or aids in getting up, exhibiting, opening, or maintaining any bull, bear, cock, or prize fight, horse-race, circus, gambling-house, or saloon, or any barbarous and noisy amusement, or who keeps, conducts, or exhibits any theater, melodeon, dance cellar, or other place of musical, theatrical, or operatic performance, spectacle, or representation, where any wines, liquors, or intoxicating drinks are bought, sold, used, drank, or given away, or who purchases any ticket of admission, or directly or indirectly pays any admission fee to or for the purpose of witnessing or attending any such place, amusement, spectacle, performance, or representation, is guilty of a misdemeanor.

Sunday laws.—Statutes regulating its observance are constitutional—18 Cal. 678; 19 Id. 130; 40 Ala. 725; 30 Ark. 131; 11 Gray, 308; 2 Grant Cas. 506; 37 Me. 149; 33 Ind. 215; 9 Id. 112; 4 Id. 619; 31 Id. 346; 117 Mass. 116; 122 Id. 40; 20 Mo. 214; 8 Pa. St. 312. A statute may prohibit dramatic performances—33 Barb. 548; or keeping open a nine-pin alley—8 Gray, 488; or keeping open a bar disconnected with the hotel business—19 Cal. 130; 21 Pa. St. 426; 30 Ark. 131. Although "Sunday laws" are not unconstitutional, yet a law which provides a day of rest for a certain specified class is "special," and unconstitutional—6 Pac. C. L. J. 211.

300. Every person who keeps open on Sunday any store, workshop, bar, saloon, banking-house, or other place of business, for the purpose of transacting business therein, is punishable by fine not less than five nor more than fifty dollars.

Desecration of the Sabbath.—Statutes for punishment of violation of the Sabbath are not in derogation of liberty and conscience—5 Eng. 259; 33 Barb. 548. They are binding on those even who conscientiously believe the seventh day ought to be observed as the Sabbath, and who actually refuse to traffic on that day—122 Mass. 40; 101 Id. 30; 3 Serg. & R. 48; 8 Pa. St. 312. The legislature may forbid or enjoin lawful occupations on any one day in the week—18 Cal. 678, overruling 9 Cal. 52; as the running of cars—2 Grant Cas. 506; or keeping open a store for traffic—59 Ala. 64; "shop" and "store" being equivalent terms—62 Ala. 484; S. C. 2 Am. Cr. R. 470; see 122 Mass. 40; 8 Pa. St. 312; 8 Gray, 384; 11 Id. 308. See Desty's Crim. Law, § 117 a.

301. The provisions of the preceding section do not apply to persons who, on Sunday, keep open hotels, boarding-houses, barber-shops, baths, markets, restaurants, taverns, livery stables, or retail drug-stores, for the legitimate business of each, or such manufacturing establishments as are usually kept in continued operation; provided, that the provisions of the preceding section shall apply to persons keeping open barber-shops, bath-houses, and hair-dressing saloons, after twelve o'clock m. on Sunday. [Approved April 15th, 1880; in effect fifteen days after passage.]

Limitations of rule.—Keeping open a barber-shop is not indictable—7 Baxt. (Tenn.) 95; nor a drug-store—33 Up. Can. Q. B. 37. A sale of liquors by a tavern-keeper on Sunday is not a profanation of the Lord's day—4 Har. (Del.) 132; 8 Ind. 112; 18 Id. 35; but a tavern-keeper is a house-keeper under a statute prohibiting gaming or unlawful recreations on the Sabbath—2 Md. 310; or an inn-keeper—3 Pick. 281. A shop, house, store, saloon, or other building in which intoxicating liquors are sold does not include an open park—39 Conn. 40; 47 Md. 485; 78 Ill. 294.

302. Every person who willfully disturbs or disquiets any assemblage of people met for religious worship, by noise, profane discourse, rude, or indecent behavior, or by any unnecessary noise, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor.

Disturbing religious worship is an indictable offense—2 Wheel. C. C. 135; 5 Har. (Del.) 490; 3 Sneed, 313; 5 Tex. Ct. App. 470; although the meeting was only to transact business—3 Sneed, 518; 78 N. C. 448;

S. C. 2 Am. Cr. R. 133. So a sunday-school is a religious meeting—6 Bart. (Tenn.) 234; or a singing-school for instruction in sacred music—28 Cal. 607; 28 id. 232. There must be an actual disturbance, by noise, or rude and indecent conduct at or near the place of worship—37 Ala. 154; 46 id. 175. So disturbing a congregation, though not in a church, chapel, or meeting-house, constitutes the offense—4 Dev. & B. 358; as a disturbance made on a camp-ground—3 Gratt. 624; *contra*, 32 Mo. 548; and see 20 Alb. L. J. 124; but not when the exercises are over—3 Ired. 111. It is sufficient if the disturbance occur a reasonable time before the dispersing of the congregation—38 Ala. 224; 53 id. 398; 3 Sneed, 313; 5 id. 518. It depends on usage and practice—53 Ala. 398; 1 Gray, 476; 53 Me. 125; 1 Craw. & D. 157; and is a question of fact for the jury—14 Ind. 429; 19 id. 181; 28 Conn. 232. See *Desty's Crim. Law*, § 93 b.

303. Every person who sells or furnishes any malt, vinous, or spirituous liquors to any person in the auditorium or lobbies of any theater, melodeon, museum, circus, or caravan, or place where any farce, comedy, tragedy, ballet, opera, or play is being performed, or any exhibition of dancing, juggling, wax-work figures and the like is being given for public amusement, and every person who employs or procures, or causes to be employed or procured, any female to sell or furnish any malt, vinous, or spirituous liquors at such place, is guilty of a misdemeanor.

Constitutional law.—Legislative enactments or municipal ordinances "to prohibit noisy amusements and to prevent immorality," are not repugnant to the Constitution of the United States or of the State of California—38 Cal. 702. See 43 Cal. 480.

Sale of liquors to minors, Act of 1872, Appendix, p. 716; on election days, Act of 1874, Appendix, p. 717; at State Capitol, Act of 1880, Appendix, p. 746. Intoxication of officers, Act of 1880, Appendix, p. 746.

304. Every person who erects or keeps a booth, tent, stall, or other contrivance for the purpose of selling or otherwise disposing of any wine, or spirituous or intoxicating liquors, or any drink of which wines, spirituous or intoxicating liquors form a part, or for selling or otherwise disposing of any article of merchandise, or who peddles or hawks about any such drink or article, within one mile of any camp or field meeting for religious worship, during the time of holding such meeting, is punishable by fine of not less than five nor more than five hundred dollars.

305. The provisions of the preceding section do not apply to any person carrying on a regular business in

the sale of liquors or other articles, which business was established prior to the appointment of the meeting referred to in such section.

306. Every person who causes, procures, or employs any female for hire, drink, or gain, to play upon any musical instrument, or to dance, promenade, or otherwise exhibit herself, in any drinking saloon, dance-cellar, ball-room, public garden, public highway, common, park, or street, or in any ship, steamboat, or railroad car, or in any place whatsoever, if in such place there is connected therewith the sale or use, as a beverage, of any intoxicating, spirituous, vinous, or malt liquors; or who shall allow the same in any premises under his control, where intoxicating, spirituous, vinous, or malt liquors are sold or used, when two or more persons are present, is punishable by a fine not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail not exceeding three months, or by both; and every female so playing upon any musical instrument, or dancing, promenading, or exhibiting herself, as herein aforesaid, is punishable by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one month, or by both. [Approved March 30th, 1874.]

§ 307. Every person who opens or maintains, to be resorted to by other persons, any place where opium, or any of its preparations, is sold or given away, to be smoked at such place, and any person who at such place sells or gives away any opium, or its said preparations, to be there smoked or otherwise used, and every person who visits or resorts to any such place for the purpose of smoking opium, or its said preparations, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. [In effect March 4th, 1881.]

309. Any proprietor, keeper, manager, conductor, or

person having the control of any house of prostitution, or any house or room resorted to for the purpose of prostitution, who shall admit or keep any minor of either sex therein, or any parent or guardian of any such minor who shall admit or keep such minor, or sanction, or connive at the admission or keeping thereof, into, or in any such house or room, shall be guilty of a misdemeanor. [In effect April 12th, 1880.]

CHAPTER VIII.

INDECENT EXPOSURE, OBSCENE EXHIBITIONS, BOOKS AND PRINTS, AND BAWDY AND OTHER DISORDERLY HOUSES.

- § 311. Indecent exposures, exhibitions, and pictures.
- § 312. Seizure of indecent articles authorized.
- § 313. Their character to be summarily determined.
- § 314. Their destruction.
- § 315. Keeping or residing in a house of ill-fame.
- § 316. Keeping disorderly houses.
- § 317. Advertising to produce miscarriage.
- § 318. Enticing to place of gambling or prostitution.

311. Every person who willfully and lewdly, either:

1. Exposes his person or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,

2. Procures, counsels, or assists any person so to expose himself, or to take part in any model artist exhibition, or to make any other exhibition of himself to public view, or to the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts; or,

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print, or figure; or,

5. Sings any lewd or obscene song, ballad, or other words, in any public place, or in any place where there are persons present to be annoyed thereby, is guilty of a

misdeemeanor. [Approved March 30th, in-effect, July 1st, 1874.]

Indecent exposure.—Any public exhibition, which outrages decency, shocks humanity, or is contrary to good morals—3 Day, 103; 32 Mo. 560; 50 id. 321; 18 Vt. 574. It is enough if it be exposed to public view in a public place—1 Dev. & B. 208; or that it is such as to render it probable that it could be seen by the public—Leigh & C. 103; and it does not depend on the number of persons to whom the exposure is made—18 Vt. 574.

Subd. 1. Exposure of person.—The indecent exposure of one's person, or the person of another, is a criminal offense—5 Barb. 203; 1 Dev. & B. 208; 3 Humph. 203; 32 Mo. 560; 4 Hun. 636; 1 Den. C. C. 338; 12 Cox C. C. 1; 13 id. 116. It is such an intentional exposure of the naked body in a public place as is calculated to shock the feelings of chastity or to corrupt the morals—3 Day, 103; 32 Mo. 560; 10 St. Tri. App. 83; 1 Sid. 168; 1 Keb. 620; or such as tends to scandalize, or to excite lascivious desires—56 Ind. 328. The exposure must not be accidental—5 Barb. 203; and the essence of the offense is that it be in a public place—43 Tex. 346; id. 538; 3 Cox C. C. 248; 3 Car. & K. 360; Leigh & C. 426; Law R. 1 C. C. 282; and in sight of others—68 N. C. 259; 20 Ark. 156; 2 Gray, 72; 28 Mo. 90; 32 id. 560. A urinal in the market-place is a public place—8 Conn. 375; or a public path, or highway—32 Mo. 560; 11 Cox C. C. 659; 2 Camp. 89; or a sea-beach visible from inhabited houses—2 Camp. 89.

Subd. 3. Obscene publications.—Any immodest or immoral publication, tending to corrupt the mind and to destroy the love of decency, morality, and good order, is punishable as a misdemeanor—17 Mass. 336; 2 Serg. & R. 91; 1 Swan, 42; see 3 Ark. 484; 25 Mo. 315; 19 Pa. St. 412; such as obscene books—11 Blatchf. 346; 2 Serg. & R. 91; 17 Mass. 336; 2 Strange, 788; 13 Cox C. C. 116; 4 Fost. & F. 73; or prints—2 Serg. & R. 91; 1 El. & B. 435; 4 Fost. & F. 73; or pamphlets—Law R. 3 C. B. 360; pictures—89 Ill. 441; 3 Day, 103; 1 Swan, 42; 27 Vt. 619; or writings—1 Hilk. 590; 8 Phila. 453; 4 Fost. & F. 73. It has been decided that the exhibition of obscene prints need not be in public—2 Serg. & R. 91. The circulation of obscene books, through the mail, is prohibited by Congress—11 Blatchf. 346. See Rev. Stat. U. S. § 3578.

Subd. 5. Obscene songs.—Two persons may be jointly indicted for singing an obscene song in public—2 Burr. 980.

312. Every person who is authorized or enjoined to arrest any person for a violation of subdivision three of the last section, is equally authorized and enjoined to seize any obscene or indecent writing, paper, book, picture, print, or figure found in possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

313. The magistrate to whom any obscene or indecent writing, paper, book, picture, print, or figure is delivered, pursuant to the foregoing section, must, upon the examination of the accused, or, if the examination is delayed

or prevented, without awaiting such examination, determine the character of such writing, paper, book, picture, print, or figure, and if he finds it to be obscene or indecent, he must deliver one copy to the district attorney of the county in which the accused is liable to indictment or trial, and must at once destroy all the other copies.

314. Upon the conviction of the accused, such district attorney must cause any writing, paper, book, picture, print, or figure, in respect whereof the accused stands convicted, and which remains in the possession or under the control of such district attorney, to be destroyed.

315. Every person who keeps a house of ill-fame in this State, resorted to for the purposes of prostitution or lewdness, or who willfully resides in such house, is guilty of a misdemeanor.

House of ill-fame.—A house of ill-fame is a house of prostitution—Law R. 1 C. C. 21; kept for the resort and the unlawful commerce of lewd people of both sexes—33 Conn. 92; 5 Ired. 603; 17 Pick. 80. It must be the resort of other women than its keeper, when the keeper is a woman—12 Allen, 177; 17 Conn. 467; 31 Id. 572; 46 N. H. 61. The gist of the offense is, that it is kept for lewd purposes, and resorted to for lewdness—64 Me. 523; S. C. 1 Am. Cr. R. 351; and if lewdness is carried on privately, it is sufficient—57 Ga. 390. There need be no outward indecency—42 Tex. 496; S. C. 1 Am. Cr. R. 350; nor disorder—Law R. 1 C. C. 21. See Desty's Crim. Law, § 108 a.

Liability of parties.—The penalty is designed for *keepers*, who may be prosecuted by indictment—12 Ala. 177; 52 Id. 377; 111 Mass. 427; 124 Id. 26; 7 Gray, 328; 1 Met. 151; 17 Pick. 80; 11 Mo. 27; 4 Denio, 129; 4 Cranch C. C. 341; 17 Conn. 467; 6 B. Mon. 21; 6 Hun, 524; 10 Id. 137; 5 Ired. 603; 10 Mod. 63; Law R. 1 C. C. 21. Every one in any way concerned in the keeping is liable either as principal or aiding and assisting—11 Bush, 610; 1 Allen, 7. A husband and wife may be jointly or severally convicted—97 Mass. 225; 1 Met. 151; 114 Mass. 281; 11 Mo. 27; 11 Bush, 610. In certain States the owner of the house rented for this purpose is liable—see Desty's Crim. Law, § 103 b.

316. Every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner; and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misde-

meanor. [Approved March 30th, in effect July 1st, 1874.]

Disorderly house.—A disorderly house is one kept in such a way as to disturb, annoy, or scandalize the public generally, or the neighbors and passers-by—8 Ind. 494; 40 Me. 559; 120 Mass. 356; 14 Mo. 112; 21 N. H. 343; 2 Serg. & R. 298; 42 Ind. 327; 5 Har. (Del.) 508; or for the purpose of public resort for thieves, drunkards, or other idle and vicious people—30 N. J. L. 102; 39 id. 463; 2 Tex. Ct. App. 82; id. 189; id. 222; and the offense of keeping need not be *lucrica*—30 N. J. L. 102; 18 Vt. 70; 36 Mass. 225; 25 Iowa, 235. It is sufficient if the disorder be frequent, and it is not necessary that all persons residing near or passing it, are annoyed—2 Allen, 299. The acts must be such as tend to annoy good citizens, and do in fact annoy such as are present—101 Mass. 29; 6 Cush. 80; by unusual noises—36 Ga. 280; 4 Parker Cr. R. 238. The keeper is liable if the house be kept in a disorderly manner—58 Ind. 5; and that the discord was exclusively within, and was not heard outside, is immaterial, if it disturbs those who have a right to access—2 Dev. & B. 424; 25 Iowa, 235; 5 Cranch C. C. 304; Law R. 1 C. C. 21. The keeper of a tippling-house is liable if it be kept in a disorderly manner—6 Blackf. 474; 8 id. 205; but the house must be kept by him, or he must hold himself out as or act as keeper—1 Cranch C. C. 203; id. 245; 5 id. 304; id. 305; id. 347; 4 id. 507; Busb. L. 252; 8 Blackf. 205; id. 260; 6 id. 474; 6 B. Mon. 21; 4 Har. (Del.) 572; 1 Salk. 45. And a license will not protect him—4 Cranch C. C. 507; 5 Har. (Del.) 508; 45 Ind. 338; 4 id. 264. See Desty's Crim. Law, §§ 106 a, b.

317. Every person who willfully writes, composes, or publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement, or otherwise, to assist in the accomplishment of any such purpose, is guilty of a felony. [Approved March 30th, in effect July 1st, 1874.]

318. Whoever, through invitation or device, prevails upon any person to visit any room, building, or other places kept for the purpose of gambling or prostitution, is guilty of a misdemeanor; and, upon conviction thereof, shall be confined in the county jail not exceeding six months, or fined not exceeding five hundred dollars, or be punished by both such fine and imprisonment. [In effect April 16th, 1880.]

CHAPTER IX.

LOTTERIES.

- § 319. Lottery defined.
- § 320. Punishment for drawing lottery.
- § 321. Punishment for selling lottery tickets.
- § 322. Aiding lotteries.
- § 323. Lottery offices. Advertising lottery offices.
- § 324. Insuring lottery tickets. Publishing offers to insure.
- § 325. Property offered for disposal in lottery forfeited.
- § 326. Letting building for lottery purposes.

319. A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.

Lottery defined. A lottery is a scheme for the distribution of prizes by lot or chance—40 Ill. 465; 59 id. 169; 42 Tex. 589; 7 Robt. 80; 49 Ala. 396; Deady, 461; S. C. 1 Green C. R. 328. When a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme, what the party who pays is to have for it, or to have nothing, it is a lottery—33 N. H. 329; 56 N. Y. 424; 39 N. J. 461; see 4 Zab. 789. If the distribution is to be by chance, it is a lottery—42 Tex. 589; 59 Ill. 163; and it may be called "gift enterprise," "book sale," "land distribution," "art association," or any other name—42 Tex. 589. So, a gift enterprise is a lottery, however artfully the scheme may be devised—Deady, 461; Abb. U. S. 275; 40 Ill. 465; 3 Heisk. 488; 97 Mass. 583; 33 N. H. 329; 3 Vroom, 398; 3 Zab. 465; 56 N. Y. 424; 5 Sneed, 507; 5 Rand. 715. No blanks are necessary to be drawn to constitute a lottery—42 Tex. 589; 4 Serg. & R. 159; 3 Zab. 465. Prizes are forfeited to the State as soon as drawn—6 Cal. 89. See, for instances of lotteries, Deady's Crim. Law, § 103 b.

320. Every person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor.

Setting up business.—In Massachusetts there are three offenses, "setting up" a lottery business is one of them—13 Ala. 504. The 190-

motion of a lottery, and aiding in such promotion, are but different modes of committing the same offense—13 Bush, 656.

321. Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person any ticket, chance, share, or interest, or any paper, certificate, or instrument purporting or understood to be or to represent any ticket, chance, share, or interest in, or depending upon the event of any lottery, is guilty of a misdemeanor.

Selling tickets an offense—13 Allen, 534; 8 Mo. 606. Any person who sells a lottery ticket is "concerned in carrying on" the business, but a resale of a ticket by a third person is not a violation of the statute—38 Ala. 83. The prohibition includes all tickets and all lotteries—13 Bush, 656; and selling or offering for sale is a misdemeanor—29 Ga. 614. The sale of a number of tickets is but one offense—6 Baxt. (Tenn.) 514. A ticket purporting to entitle the holder to whatever prize should be drawn by a corresponding number, in a scheme called a prize concert, is a lottery ticket—97 Mass. 583. The general law punishing for sale of lottery tickets is not repealed by a special act authorizing a lottery—40 Cal. 419.

322. Every person who aids or assists, either by printing, writing, advertising, publishing, or otherwise, in setting up, managing, or drawing any lottery, or in selling or disposing of any ticket, chance, or share therein, is guilty of a misdemeanor.

Publication.—It is a misdemeanor to publish an account of a lottery to be drawn in another State or Territory—3 Denio, 212; 1 N. Y. 180. In Connecticut, it is criminal to publish any printed proposals to sell or procure lottery tickets, and the statute applies to domestic as well as foreign lotteries, but a "caution notice" is not a violation of the statute—28 Conn. 225. In Massachusetts, the printer of a newspaper containing an advertisement of lottery tickets is liable, and a sign-board is an advertisement—5 Pick. 41; and it is no defense that it is a foreign lottery—2 Met. 323.

323. Every person who opens, sets up, or keeps, by himself or by any other person, any office or other place for the sale of, or for registering the number of any ticket in any lottery, or who by printing, writing, or otherwise, advertises or publishes the setting up, opening, or using of any such office, is guilty of a misdemeanor.

324. Every person who insures or receives any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be

drawn within this State or not, or who receives any valuable consideration upon any agreement to repay any sum, or deliver the same, or any other property, if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn, at any particular time or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action, or property, or to forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency, dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal of any of the purposes aforesaid, is guilty of a misdemeanor.

Insuring tickets.—A guaranty, binding the guarantor to pay the prize, is a lottery ticket, though not in the form of one—5 Rand. 715.

325. All moneys and property offered for sale or distribution in violation of any of the provisions of this chapter are forfeited to the State, and may be recovered by information filed, or by an action brought by the attorney-general, or by any district attorney, in the name of the State. Upon the filing of the information or complaint, the clerk of the court, or if the suit be in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner, as attachments issued from the district courts in civil cases.

326. Every person who lets, or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing, or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

Lottery offices.—In New York, it is not an indictable offense to keep a room for the sale of lottery tickets—3 Denio, 101.

CHAPTER X.

GAMING.

- § 330. Gaming prohibited. Penalty.
- § 331. Permitting gambling in houses owned or rented.
- § 332. Winning at play by fraudulent means.
- § 333. Witnesses neglecting or refusing to attend trial.
- § 334. Witness' privilege.
- § 335. Duties of district attorneys, sheriffs, and others.
- § 336. Permitting minor to play in saloon.

330. Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts, either as owner or employé, whether for hire or not, any game of *faro*, *monté*, *roulette*, *lansquenet*, *rouge et noire*, *rondo*, or any banking game played with cards, dice, or any device, for money, checks, credit, or any other representative of value, is punishable by fine of not less than two hundred nor more than one thousand dollars, and shall be imprisoned in the county jail until such fine and costs of prosecution are paid, such imprisonment not to exceed one year.

Statutory offense.—The substance of the statutory offense is to deal a game for money—14 Cal. 30. The statute in relation to gambling is constitutional—14 Cal. 573. It must be construed with the general act concerning criminal proceedings, and where a fine is imposed on conviction, defendant may be imprisoned to enforce its payment—7 Cal. 208. A statute authorizing the granting of a license to keep a gambling-house, affords protection solely against a criminal prosecution—1 Cal. 441; it does not legalize gambling contracts which are void at common law—1 Cal. 441; 2 id. 81; 3 id. 329; 4 id. 323; but notes given for a gambling consideration are valid in the hands of a *bona fide* indorsee—2 Cal. 64; 4 id. 321. This section does not apply to one who merely bets at the game; such a person is not accessory to the crime of gaming—53 Cal. 247. The offense is a misdemeanor punishable by fine, and imprisonment till the fine is paid—47 Cal. 128; as at common law—2 Blackf. 251. See *Desty's Crim. Law*, § 101 a. As to prohibited games, see id. § 101 b.

Offense at common law.—An agreement between two or more persons to risk their money or property in a contest or chance of any kind, where one may be gainer and the other loser, is gambling at common law—5 Sneed, 507; 3 Helsk. 488; S. C. 1 Green C. R. 323; see 1 Meigs, 99; 1 Humph. 496; and is an indictable offense—3 Cranch C. C.

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661; 1 id. 150; 2 id. 45; id. 92. Single acts constitute the offense—11 R. I. 417; 13 Mo. 455; 15 Ala. 383; 20 id. 30; 1 Ohio St. 61; and consecutive games at one sitting constitute one offense—13 Ga. 396; 20 id. 155. The gist of the offense is the obtaining of property of another by the fraudulent use of cards or other devices—76 Ill. 265; and the publicity of the act—51 Ala. 23. See 14 Gray, 390; id. 26.

Betting.—A bet is a wager, and the bet is complete when the offer to bet is complete, although the stake be neither lost nor won—7 Port. 453. To constitute a wager, both parties must incur a risk—5 Humph. 561. In California, one who bets at faro is not accessory to the crime of gaming—53 Cal. 247; and see 22 Ala. 16. As to the statutes of other States—see Desty's Crim. Law, § 101 c, *et seq.* Wagers affecting third persons or the public peace, morals, or public policy, at common law are not recoverable—6 Cal. 359; 37 id. 670; 37 id. 168; 43 id. 616; but they may be disaffirmed before the result is known, and the money in hands of a stakeholder be recovered—37 Cal. 670. See Desty's Crim. Law, §§ 70 g, 101 c. Betting at races—see id. § 101 d.

331. Every person who knowingly permits any of the games mentioned in the preceding section to be played, conducted, or dealt in any house owned or rented by such person, in whole or in part, is punishable as provided in the preceding section.

Liability.—The owners are liable only when the gaming is done with their knowledge—7 Cal. 208. See Desty's Crim. Law, § 102 c.

332. Every person who, by the game of "three-card monte" so-called, or any other game, device, sleight of hand, pretensions to fortune-telling, trick, or other means whatever, by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money or property of any description, shall be punished as in case of larceny of property of like value. [In effect April 16th, 1880.]

Cheating at games—as with false dice, etc., is a misdemeanor at common law—see 1 Russ Cr. 9th ed. 624. So of a conspiracy to cheat—4 Cox C. C. 390; 8 id. 305.

333. Every person duly summoned as a witness for the prosecution, on any proceedings had under this chapter, who neglects or refuses to attend, as required, is guilty of a misdemeanor.

See Code Civ. Proc. part iv, title iii, chap. ii.

334. No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may crim-

inate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified.

335. Every district attorney, sheriff, constable, or police officer must inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of this chapter, and every such officer refusing or neglecting so to do, is guilty of a misdemeanor.

336. Every owner or lessee, or keeper of any house used in whole, or in part, as a saloon or drinking-place, who knowingly permits any person under twenty-one years of age to play at any game of chance therein, is guilty of a misdemeanor. [Approved March 24th, 1874.]

CHAPTER XI.

PAWNBROKERS.

- § 338. Pawnbroking without license.
- § 339. Failing to keep a register.
- § 340. Charging unlawful rate of interest.
- § 341. Selling before time of redemption has expired, or without notice.
- § 342. Refusing to disclose particulars of sale.
- § 343. Refusing to allow an officer with search-warrant to inspect register of pledged articles.

338. Every person who carries on the business of a pawnbroker, by receiving goods in pledge for loans at any rate of interest above the rate of ten per cent. per annum, except by authority of a license, is guilty of a misdemeanor.

Constitutional law.—The Code provision limiting the rate of interest which may be charged on loans, is not repugnant to art. 1, § 2 of the State Constitution—29 Cal. 271. See § 501, *post*, and see Civ. Code, §§ 2066-3011.

339. Every person who carries on the business of a pawnbroker, who fails at the time of the transaction to enter in a register kept by him for that purpose, in the English language, the date, duration, amount, and rate of interest of every loan made by him, or an accurate description of the property pledged, or the name and residence of the pledgor, or to deliver to the pledgor a written copy of such entry, or to keep an account in writing of all sales made by him, is guilty of a misdemeanor.

See § 502, *post*.

340. Every pawnbroker who charges or receives interest at the rate of more than two per cent. per month, or who, by charging commissions, discount, storage, or other charge, or by compounding, increases or attempts to increase such interest, is guilty of a misdemeanor. [In effect March 7th, 1881.]

341. Every pawnbroker who sells any article pledged to him and unredeemed, until it has remained in his possession six months after the last day fixed by contract for redemption, or who makes any sale without publishing in a newspaper printed in the city, town, or county, at least five days before such sale, a notice containing a list of the articles to be sold, and specifying the time and place of sale, is guilty of a misdemeanor.

342. Every pawnbroker who willfully refuses to disclose to the pledgor or his agent the name of the purchaser and the price received by him for any article received by him in pledge and subsequently sold, or who, after deducting from the proceeds of any sale the amount of the loan and interest due thereon, and four per cent on the loan for expenses of sale, refuses, on demand, to pay the balance to the pledgor or his agent, is guilty of a misdemeanor.

See § 502, post.

343. Every pawnbroker who fails, refuses, or neglects to produce for inspection his register, or to exhibit all articles received by him in pledge, or his account of sales, to any officer holding a warrant authorizing him to search for personal property, or the order of a committing magistrate directing such officer to inspect such register, or examine such articles or account of sales, is guilty of a misdemeanor.

See § 502, post.

CHAPTER XII.

OTHER INJURIES TO PERSONS.

- § 346. Acts of intoxicated physicians.
- § 347. Willfully poisoning food, medicine, or water.
- § 348. Mismanagement of steamboats.
- § 349. Mismanagement of steam-boilers.
- § 350. Counterfeiting trade-marks.
- § 351. Selling goods which bear counterfeit trade-marks.
- § 352. Definition of the phrase "counterfeited trade-marks," etc.
- § 353. "Trade-mark" defined.
- § 354. Refilling casks, etc., bearing trade-mark.
- § 355. Defacing marks upon wrecked property and destroying bills of lading.
- § 356. Defacing marks upon logs, lumber, or wood.
- § 357. Altering brands.
- § 358. Frauds in affairs of special partnership.
- § 359. Contracting or solemnizing incestuous or forbidden marriages.
- § 360. Making false return or record of marriage.
- § 361. Cruel treatment of lunatics, etc.
- § 362. Refusing to issue or obey writ of habeas corpus.
- § 363. Reconfining persons discharged upon writ of habeas corpus.
- § 364. Concealing persons entitled to benefit of habeas corpus.
- § 365. Innkeepers and carriers refusing to receive guests.
- § 366. Counterfeiting quicksilver stamps.
- § 367. Selling debased quicksilver.

346. Every physician who, in a state of intoxication, does any act as such physician to another person by which the life of such other person is endangered, is guilty of a misdemeanor.

Intoxication.—Voluntary intoxication is no excuse for crime—see many cases collected in Desty's Crim. Law, § 26 a. Evidence of intoxication is admissible as to the question of premeditation—21 Cal. 547; 27 id. 514; 43 id. 352; or to show a mental condition incapable of forming a specific intent—29 Cal. 683; 34 id. 217; 43 id. 352, in determining the degree of the crime—36 Cal. 534.

347. Every person who willfully mingles any poison with any food, drink, or medicine, with intent that the same shall be taken by any human being, to his injury,

and every person who willfully poisons any spring, well, or reservoir of water, is punishable by imprisonment in the State prison for a term not less than one nor more than ten years.

Public health.—Crimes against public health are those by which the physical health of the people at large is endangered or impaired, as polluting streams—6 Rand. 726; or fountains—8 N. H. 203; 37 Ala. 123; or rendering water unwholesome, corrupt, or unfit for use—8 N. H. 203; 6 Car. & P. 292; 4 Up. Can. Q. B. 158. Any acts or omissions which are liable to generate disease or communicate infections are indictable offenses—3 Hill, 479; 35 Iowa, 570; 8 N. H. 203; 3 Rich. 438; 8 C. 1 Green C. R. 503; 15 Wend. 397; 4 Up. Can. Q. B. 158. See Desty's Crim. Law, § 118 a.

Unwholesome provisions.—Selling, exposing for sale, or giving away food rendered unwholesome by admixture of noxious substances is an indictable offense—3 Hawks, 378; 3 Fost. & F. 166; or exposing for sale any article unfit for human food—3 Hawks, 378; 1 Head, 160; or injurious to health—2 Ired. 40; 38 N. Y. 85; 3 Parker Cr. R. 622; 8 C. 19 N. Y. 574. See Desty's Crim. Law, § 119 a.

348. Every captain or other person having charge of any steamboat used for the conveyance of passengers, or of the boilers and engines thereof, who, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler, or any apparatus or machinery connected therewith, by which bursting or breaking human life is endangered, is guilty of a felony. [Approved March 30th, in effect July 1st, 1874.]

Criminal negligence.—Gross carelessness resulting in injury to others is criminal, even if the act done be lawful—Anth. 208; 6 B. Mon. 170; 11 Humph. 159; 4 Mason, 505; 4 Car. & P. 398; 3 id. 629; 7 id. 499; and an act of omission, as well as an act of commission, may be criminal—2 Blatchf. 528; 5 McLean, 242; 4 Cox C. C. 449; 3 Car. & K. 123; 1 Cox C. C. 352; 2 Car. & K. 368; 4 Fost. & F. 504; as the officer of a steamboat, through whose negligence an explosion takes place—5 McLean, 242. See Desty's Crim. Law, § 7 a. See *post*, notes to §§ 349, 350.

349. Every engineer or other person having charge of any steam-boiler, steam-engine, or other apparatus for generating or employing steam, used in any manufactory, railway, or other mechanical works, who willfully, or from ignorance, or gross neglect, creates, or allows to be created such an undue quantity of steam as to burst or break the boiler, or engine, or apparatus, or cause any

other accident whereby human life is endangered, is guilty of a felony. [Approved March 30th, in effect July 1st, 1874.]

Mismanagement of steam-boilers.—Where a man, appointed to tend a steam-engine of a colliery, left it in charge of an incompetent person and death ensued, he is guilty of manslaughter—4 Cox C. C. 449; 8 C. 3 Car. & K. 123. See Negligence, *ante*, § 7, subd. 2; “willfully,” *id.* subd. 1. As to personal injuries, see Civ. Code, §§ 43, 1708, 1714, 1838, and 2194.

350. Every person who willfully forges or counterfeits, or procures to be forged or counterfeited, any trade-mark usually affixed by any person to his goods, with intent to pass off any goods to which such forged or counterfeited trade-mark is affixed or intended to be affixed, as the goods of such person, is guilty of a misdemeanor.

Trade-marks.—Subjects of forgery—1 Whart. C. L. 8th ed. § 690; 2 Russ. Cr. 9th ed. 704. See Trade-marks, Civ. Code, §§ 655, 991; and Pol. Code, §§ 3196-3199.

351. Every person who sells, or keeps for sale, any goods upon or to which any counterfeited trade-mark has been affixed, intending to represent such goods as the genuine goods of another, knowing the same to be counterfeited, is guilty of a misdemeanor.

See Civ. Code, § 1772.

352. The phrases “forged trade-mark” and “counterfeited trade-mark,” or their equivalents, as used in this chapter, include every alteration or imitation of any trade-mark so resembling the original as to be likely to deceive.

353. The phrase “trade-mark,” as used in the three preceding sections, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman, to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description.

354. Every person who has, or uses, any cask, bottle, vessel, case, cover, label, or other thing bearing or having in any way connected with it the duly filed trade-mark or name of another, for the purpose of disposing, with intent to deceive or defraud, of any article other than that which such cask, bottle, vessel, case, cover, label, or other thing originally contained, or was connected with, by the owner of such trade-mark or name, is guilty of a misdemeanor.

See §§ 349, 350, 351.

355. Every person who defaces or obliterates the marks upon wrecked property, or in any manner disguises the appearance thereof, with intent to prevent the owner from discovering its identity, or who destroys or suppresses any invoice, bill of lading, or other document tending to show the ownership, is guilty of a misdemeanor.

See Pol. Code, §§ 2403-2418.

356. Every person who cuts out, alters, or defaces any mark made upon any log, lumber, or wood, or puts a false mark thereon with intent to prevent the owner from discovering its identity, is guilty of a misdemeanor.

See Pol. Code, §§ 2389-2393.

357. Every person who marks or brands, alters, or defaces the mark or brand of any horse, mare, colt, jack, jennet, mule, bull, ox, steer, cow, calf, sheep, goat, hog, shoat, or pig, belonging to another, with intent thereby to steal the same, or to prevent identification thereof by the true owner, is punishable by imprisonment in the State prison for not less than one nor more than five years.

See Pol. Code, §§ 3167-3172, 3182-3185.

358. Every member of a special partnership, who commits any fraud in the affairs of the partnership, is guilty of a misdemeanor.

See Civ. Code, § 2477.

359. Every person authorized to solemnize marriage, who willfully and knowingly solemnizes any incestuous

or other marriage forbidden by law, is punishable by fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three months nor more than one year, or by both.

See Civ. Code, § 59. Authority to solemnize marriage—*id.* § 70. See Incest, *ante*, § 285.

360. Every person authorized to solemnize any marriage, who willfully makes a false return of any marriage or pretended marriage to the recorder, and every person who willfully makes a false record of any marriage return, is punishable as provided in the preceding section.

See Civ. Code, §§ 73, 74, 76.

361. Every person guilty of any harsh, cruel, or unkind treatment of, or any neglect of duty towards, any idiot, lunatic, or insane person, is guilty of a misdemeanor.

Public duty.—Wherever a party owes the public a duty, he is indictable for breach of that duty—37 Ala. 123. So, exposing helpless persons to physical danger, by those having them in charge, is indictable—Russ. & R. C. C. 20; 10 Cox C. C. 569; Law R. 1 C. C. 311; *id.* 222; Dears. 453; 9 Cox C. C. 123. A guardian, master, or keeper of an asylum, is indictable for negligence where injury results—77 N. C. 494; Russ. & R. C. C. 20; *id.* 48; 4 Cox C. C. 455; 8 *id.* 449; 10 *id.* 82; 8 Car. & P. 425. See Desty's Crim. Law, § 87 a.

362. Every officer or person to whom a writ of habeas corpus may be directed, who, after service thereof, neglects or refuses to obey the command thereof, is guilty of a misdemeanor.

363. Every person who, either solely or as member of a court, knowingly and unlawfully recommits, imprisons, or restrains of his liberty, for the same cause, any person who has been discharged upon a writ of habeas corpus, is guilty of a misdemeanor.

See Habeas Corpus, *post*, §§ 1473, *et seq.*

364. Every person having in his custody, or under his restraint or power, any person for whose relief a writ of habeas corpus has been issued, who, with the intent to elude the service of such writ or to avoid the effect thereof, transfers such person to the custody of another, or places him under the power or control of another, or conceals or changes the place of his confinement or restraint,

or removes him without the jurisdiction of the court or judge issuing the writ, is guilty of a misdemeanor.

See *Habeas Corpus*, *post*, §§ 1473, *et seq*.

365. Every person, and every agent or officer of any corporation, carrying on business as an innkeeper, or as a common carrier of passengers, who refuses, without just cause or excuse, to receive and entertain any guest, or to receive and carry any passenger, is guilty of a misdemeanor.

Neglect of duty.—An innkeeper, having room in his house, who refuses to receive a visitor who tenders a reasonable price for entertainment, is indictable at common law—4 Har. (Del.) 152; 2 Dev. & B. 424; 12 Mod. 445; 7 Car. & P. 213; 8 Mees. & W. 289; 13 Cox C. C. 378. So, if having received a guest he refuses to find food and lodging for him—1 Hawk. P. C. 714; but the person applying must be a traveler—12 Mod. 445. See Civ. Code, §§ 1859, 1860.

366. Every person who counterfeits, or who willfully uses the counterfeited seal or stamp of any person engaged in manufacturing or selling quicksilver, is guilty of a felony.

See *ante*, §§ 349, 350.

367. Every person who willfully sells, or offers for sale as pure, any debased or adulterated quicksilver, is guilty of a misdemeanor.

See *ante*, §§ 349, 350.

TITLE X.

Of Crimes against the Public Health and Safety.

- § 368. Death from explosions, etc.
- § 369. Death from collision on railroads.
- § 370. "Public nuisances" defined.
- § 371. Unequal damage.
- § 372. Maintaining a nuisance, a misdemeanor.
- § 373. Establishing or keeping pest-houses within cities, towns, etc.
- § 374. Putting dead animals in streets, rivers, etc.
- § 375. Keeping gunpowder, etc., unlawfully.
- § 376. Violation of quarantine laws by masters of vessels.
- § 377. Willful violation of health laws.
- § 378. Neglecting to perform duties under health law.
- § 379. Unlicensed piloting.
- § 380. Apothecary omitting to label drugs, or labeling them wrongfully, etc.
- § 381. Putting extraneous substances in packages of goods usually sold by weight, with intent to increase weight.
- § 382. Adulterating food, drugs, liquors, etc.
- § 383. Disposing of tainted food, etc.
- § 384. Setting woods on fire.
- § 385. Obstructing attempts to extinguish fires.
- § 386. Maintaining bridge or ferry without authority.
- § 387. Violating condition of undertaking to keep ferry.
- § 388. Riding or driving faster than a walk on toll-bridges.
- § 389. Crossing toll-bridges, etc., without paying toll.
- § 390. Engineer of locomotive engine omitting to ring bell when crossing highway.
- § 391. Intoxication of engineers, conductors, or drivers of locomotives or cars.
- § 392. Placing passenger cars in front of freight cars.
- § 393. Violation of duty by employes of railroad companies.
- § 394. Exposing person infected with any contagious disease in a public place.
- § 395. Frauds practiced to affect the market price.
- § 396. Racing upon highways.
- § 397. Selling liquor to Indians.
- § 398. Selling fire-arms and ammunition to Indians.
- § 399. Death from mischievous animals.

- § 400. Aiding or encouraging suicide a felony.
- § 400. Exhibiting deformities of person.
- § 400. Using or exposing animal with glanders.
- § 401. Animal having glanders to be killed.
- § 401. Adulterating candy.

368. Every person having charge of any steam-boiler or steam-engine, or other apparatus for generating or employing steam, used in any manufactory, or on any railroad, or in any vessel, or in any kind of mechanical work, who willfully, or from ignorance or neglect, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler, engine, or apparatus, or to cause any other accident whereby the death of a human being is produced, is punishable by imprisonment in the State prison for not less than one nor more than ten years.

Negligence.—Carelessness is criminal, and within limits supplies the place of direct criminal intent—Anth. 208; 6 B. Mon. 171. And an act of omission as well as an act of commission may be criminal—2 Blatchf. 528; 5 McLean, 242. So where an engineer left his engine in charge of an incompetent person, and death ensued, he was guilty of manslaughter—4 Cox C. C. 449; S. C. 3 Car. & K. 123; or the officer of a steamboat through whose negligence an explosion takes place which destroys life—5 McLean, 242; or engineers and other officers generally, if injury ensues, as a regular and usual consequence, from their omission—2 Car. & K. 368; 3 id. 123; 4 Cox C. C. 449.

369. Every conductor, engineer, brakeman, switchman, or other person having charge, wholly or in part, of any railroad car, locomotive, or train, who willfully or negligently suffers or causes the same to collide with another car, locomotive, or train, or with any other object or thing whereby the death of a human being is produced, is punishable by imprisonment in the State prison for not less than one nor more than ten years.

370. Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square,

street, or highway, is a public nuisance. [Approved March 30th, in effect July 1st, 1874.]

Public nuisance.—A public nuisance is one which affects, equally, the rights of the whole community or neighborhood, although the extent of the damage may be unequal—Civ. Code, § 3480.

It is an act or omission which unlawfully annoys or injures the public in common, and not merely some particular person—52 Mo. 164; S. C. 1 Green C. R. 553; 3 Up. Can. C. P. 645; 3 id. 333; but it is not necessary that all the community be affected—6 Rand. 726; 2 Yerg. 482; 1 Dev. & B. 195. By the statute, whatever is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, is a nuisance—8 Ind. 494. It is enough if it offends the senses, or disturbs the comfort of the community—1 Bush, 139; 8 Cowen, 146; 1 Denio, 424; 5 Har. (Del.) 487; 8 Ind. 494; 4 Mass. 522; 13 Met. 365; 3 S. C. 438; S. C. 1 Green C. R. 503; 1 Burr. 333; 2 Car. & P. 485. It is public if it annoys such part of the public as necessarily comes in contact with it—id. Where the statute does not cover all cases of nuisance, the common-law rule is in force—59 Mo. 321.

Public decency.—It is enough if the public nuisance shocks public morality—10 Humph. 99; 1 Swan, 42; id. 136; 3 Humph. 203; id. 229; 2 id. 414; 1 id. 396; 2 Bail. 149; 2 Yerg. 482; 19 Pa. St. 412; 1 Murph. 254; 1 Dev. 267; 4 Yerg. 163; 3 Day, 103; 52 Ind. 311; 126 Mass. 46; 4 Fost. & F. 73; Law R. 1 Q. B. D. 15; Comb. 304. Whatever openly outrages decency, and is injurious to, or tends to corrupt public morals, is a misdemeanor—3 Day, 103; 7 Conn. 267; 17 Mass. 336; 10 Ind. 140; 2 Serg. & R. 91; Law R. 3 Q. B. 360; 8 Phila. 453; as public blasphemy and profane swearing—43 Cal. 480; 2 Har. (Del.) 553; 9 Ired. 38; 8 Johns. 290; 11 Serg. & R. 394; 3 Helsk. 135; 1 Dev. 267; 63 N. C. 259; 3 Sneed, 134; 13 Pick. 359; 19 Pa. St. 412; 1 Swan, 42; 70 N. C. 67; 1 Murph. 254; 20 Pick. 206; or the public utterance of obscene language—1 Swan, 42; or the public exhibition of obscene pictures, prints, and writings—17 Mass. 336; 1 Hilt. 530; 8 Phila. 453; 2 Serg. & R. 91; 4 Fost. & F. 73; or the public exposure of one's person, or the person of another—5 Barb. 203; 1 Dev. & B. 208; 3 Humph. 203; 32 Mo. 560; 4 Hun, 636; 1 Den. C. C. 338; 12 Cox C. C. 1; 13 id. 116. So every public show which outrages decency, shocks humanity, or is contrary to good morals, is indictable—3 Day, 103; 2 Duval, 89. See Desty's Crim. Law, § 109 a.

Obstructing highway.—All injuries or obstructions to a highway, and all acts which will render it less commodious, are public nuisances—1 Denio, 524; 2 Ind. 440; 3 id. 447; 26 Wis. 547; 5 Ired. 369; but the road must be public—2 Pick. 44; 1 Strob. 110; 2 Kerr, 614; and the offense must be to the public generally—35 N. H. 368; 7 Mich. 432. Some injury must be done, or some danger or annoyance to passers thereon must be created—Law R. 1 C. P. 321; as placing obstructions without authority—107 Mass. 234. The obstruction of any road laid out by authority is a nuisance—1 McMull, 44; although it be opened by an erroneous judgment—2 Dev. & B. 547. So, where a highway was discontinued, and a new road used by the public—2 Humph. 543. Anything done by an owner interfering with the right of way to a dedicated highway, is a nuisance—Law R. 5 Q. B. 31. The obstruction must injuriously affect some public right—7 Mich. 432; and it must be material and uncensored—35 Conn. 313; but a license is no defense for negligent obstruction—8 Blackf. 260; 5 Har. (Del.) 508; 107 Mass. 188; 1 Pa. St. 105; 60 id. 367; 21 Alb. L. J. 36; 2 Gale & D. 729; 1 Barn. & Adol. 444. See citations in Desty's Crim. Law, §§ 121 a, b.

Danger to life or property.—The keeping or manufacturing of explosives, or inflammable substances, in such quantities and places, or in such manner as to endanger life or property, is a nuisance—34 Me. 36; 74 Pa. St. 230; 107 Mass. 188; 56 Barb. 72; 1 Johns. 78; 1 Swan, 213;

Thach. C. C. 14; 3 East, 192; Dears. & B. 209; as, large quantities of gunpowder kept in populous places—1 Johns. 78; 6 Hill, 292; 12 Mod. 342; 56 Barb. 72; 2 Strange, 1167; spring-guns set to the highway, whereby life is endangered—31 Conn. 479; 53 Ala. 1; racing on public roads—1 Head, 154; 33 Ala. 428; 6 Baxt. (Tenn.) 545; or driving through a crowded street—Peters C. C. 390; excavating area and leaving it open—2 Blackf. 423; 9 Com. B. 392; blasting, so as to project stones on highway—Leigh & C. 489; projecting buildings subjecting passengers to danger—51 Cal. 142; 45 Ind. 429; see 55 N. H. 55; things overhanging highway, exposing passengers to danger—117 Mass. 114; 67 Pa. St. 355; 1 Salk. 357. See Desty's Crim. Law, § 118 b.

Highways, what are.—A highway is a public road, and not a private way—20 Ala. 86. A way of necessity does not give to the public a permanent easement—44 N. H. 628; but where a way has always been used as a public highway, the public right will not be deemed to have been lost by abandonment—50 N. H. 9. The number of persons using a way and repairing it will not make it a public way, if not common to all persons—8 Term. Rep. 634. A foot-way, horse-way, or *cul de sac*, if common to all people, is a highway—2 Pick. 44; 1 McCord, 404; 6 Rich. 112; 1 Strob. 110; 35 N. H. 368; 10 Mod. 382; or a turnpike—21 Alb. L. J. 36; 2 Pa. St. 114; 16 Pick. 175; or toll-road—16 Pick. 175; 2 Lewin, 193; or any public square or space dedicated to public use—3 Hill, (S. C.) 149; 3 Pa. St. 202; 14 id. 186; 2 Watts, 23; 24 Vt. 448; or a bridge—28 N. H. 195; 3 Barn. & Adol. 201; or a ferry—2 Dill. 332; 7 Humph. 86; 5 La. An. 661; 24 id. 542; 42 Me. 9; 1 Nott & McC. 357; 2 Va. Cas. 354; 11 Wend. 586; 3 Zab. 206; 4 id. 718; or navigable rivers, harbors, and the great lakes are highways—10 Ill. 351; 13 How. 518; 4 Jones, (N. C.) 107; 43 Me. 198; 2 Mich. 619; 1 Pa. St. 105; 15 Rich. 310.

Dedication to public use.—Presumption of dedication depends more on the owner's assent than on the length of time of non-user—49 Ala. 333. Formal acceptance by the authorities is not necessary—20 Ala. 86; 21 Dana, 417; 34 Me. 9; 7 Mass. 378; 16 Pick. 275; 11 Serg. & R. 345; 6 Port. 372; 2 W. Va. 589. A road open to the public without limit or restriction, and recognized by the town in expenditure for repairs, is a public highway—59 Me. 366; but, merely repairing does not constitute an acceptance—40 Me. 154. It may be accepted by vote, or any act recognizing an obligation to repair, or by twenty years' user, or by substituting it for an ancient highway—16 N. H. 203. It is sufficient if the public have the right to pass and repass thereon—20 Ala. 86; 21 Dana, 417; 34 Me. 9; 7 Mass. 378; 16 Pick. 275; 11 Serg. & R. 345; 6 Port. 372; 2 W. Va. 589.

Obstruction of streets.—A use of a public street or square cannot be obtained by prescription—50 Cal. 265; 53 id. 437; 2 Pick. 44; 1 Whart. 469; nor is the public right lost by non-user—2 Humph. 543. No length of time legitimates a nuisance—1 Bush, 139; 1 Denio, 524; 6 Gray, 473; 2 Humph. 543; 4 Ind. 515; 2 Pick. 44; 9 Wend. 315; 1 Whart. 469; 4 Wis. 387; 3 S. C. 438; 8 C. 1 Green C. R. 503; 4 Thomp. & C. 567; 8 Up. Can. C. P. 208; 3 Camp. 227; 4 Bing. N. C. 183; 2 id. 134; 4 id. 185; 7 East, 199. Whatever interferes with travel, either by permanent or temporary structures or impediments, is a nuisance—6 East, 427. So of a passage-way from one highway to another—1 McCord, 404; as keeping material in front of a house for repairs—3 Camp. 230; or frontsteps of a dwelling so built as to be an obstruction—107 Mass. 234; or the delivery of grain through pipes, received in casks standing in wagons—1 Denio, 524; or delivery wagons impeding travel—6 East, 427; 3 Camp. 227; or a team in front of a horse-car refusing to turn off the track—14 Gray, 69; or a gas company obstructing the highway, is a nuisance—7 Up. Can. L. J. 23. A mere encroachment rendering the highway less commodious, is a nuisance—35 Conn. 314; 12 Cush. 254; 14 Gray, 69.

Obstructing sidewalk.—Obstructing a sidewalk is an offense—11 Pa. St. 196; as by a stall, for sale of fruit, etc.—6 Gill, 425; 4 Clark, (Pa.) 324;

see 107 Mass. 234; 11 Serg. & R. 345; or sales by constables—13 id. 403; or by auctioneers—1 id. 217; or by collecting crowds by use of violent or excited language—113 Mass. 8; 1 Denio, 524; 19 Pa. St. 412; 1 Swan, 42; or by exhibiting effigies at a window—6 Car. & P. 636; or by exhibiting a stuffed paddy, or any public show or game—4 Clark, (Pa.) 17; 6 Car. & P. 636; Law R. 5 Eq. 25; 4 Fost. & F. 73; or by the use of a velocipede—30 Up. Can. Q. B. 41. A temporary obstruction on receiving or delivering goods is allowed—1 Denio, 524; so telegraph poles are not a nuisance—97 Mass. 555.

Obstruction by railroads.—The unlawful obstruction of a highway by a railroad is a nuisance, and the company is liable to indictment—4 Gray, 22; 27 Vt. 103; as by leaving cars on a highway—3 Zab. 360; 112 Mass. 412; 73 Pa. St. 29; or building a road across a highway without authority—4 Gray, 22; 14 id. 93; or, if authorized, negligently or oppressively exercising its rights—21 Alb. L. J. 36; or crossing, to the anxiety or danger of passers—27 Pa. St. 339; but a train crossing highways, the company keeping closely within the range of its charter, is not indictable—101 Mass. 201; see 4 Barn. & Adol. 30. See Desty's Crim. Law, § 121 g.

Obstructions to navigable waters.—To obstruct the passage of a navigable river by bridges, or otherwise, is a nuisance—43 Me. 196; 13 How. 518; 1 Pa. St. 105; 4 Jones, (N. C.) 107; 15 Rich. 310; 10 Ill. 351; 2 Mich. 519; 4 Ad. & E. 384; 6 id. 143; 16 Q. B. 1022; or to divert part of the water—2 Show. 30; as by a dam—5 Pick. 199; 6 Rand. 726; 4 Wis. 387; 35 Iowa, 670; or a wharf, if its effect is to fill up the channel or divert the current—Thach. C. C. 211; 2 Stark. 511. See Desty's Crim. Law, § 122 a.

Nuisances in general.—The following have been held nuisances at common law: gambling-houses and places for other useless sports—30 Me. 65; 4 Smith E. D. 570; 5 Hill, 121; Charlt. R. M. 1; 3 Denio, 101; 8 Eng. 700; 3 Cranch C. C. 656; 2 id. 92; 4 id. 108; 1 id. 150; 1 Va. Cas. 133; 1 Day, 60; 2 Colo. 509; disorderly houses—6 B. Mon. 21; 6 Blackf. 474; 4 Parker Cr. R. 238; 8 Blackf. 205; 8 Ind. 494; 13 Pick. 359; 21 N. H. 343; 1 Saik. 384; a public lottery—9 Nev. 101; 18 Up. Can. Q. B. 403; 8 Up. Can. C. P. 189; keeping a public tippling-house for promiscuous and noisy tippling and promoting drunkenness—43 Ind. 327; 5 Cranch C. C. 304; 6 Blackf. 474; 12 B. Mon. 2; Law R. 1 C. C. 21; common drunkenness, although the party be not constantly in that condition—34 Vt. 323; houses of ill-fame, if open, notorious, and scandalous to the public generally—2 Yerg. 482; 4 McCord, 472; 2 Serg. & R. 298; 43 Ind. 327; any public exhibition which is scandalous—3 Day, 103; adulteration of food—3 Maule & S. 11; 4 Camp. 12; 4 Maule & S. 214; carrying on offensive trades in a thickly populated community—27 Ind. 430; all injuries or obstructions to highways—1 Denio, 424; 2 Ind. 440; 3 id. 447; 26 Wis. 547; 5 Ired. 369; to allow a highway to become grossly out of repair—12 Up. Can. C. P. 450; 9 Car. & P. 469.

371. An act which affects an entire community or neighborhood, or any considerable number of persons, as specified in the last section, is not less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal. [Approved March 30th, in effect July 1st, 1874.]

372. Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any

legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor.

373. Every person who establishes or keeps, or causes to be established or kept, within the limits of any city, town, or village, any pest-house, hospital, or place for persons affected with contagious or infectious diseases, is guilty of a misdemeanor.

374. Every person who puts the carcass of any dead animal, or the offal from any slaughter-pen, corral, or butcher-shop, into any river, creek, pond, reservoir, stream, street, alley, public highway, or road in common use, or who attempts to destroy the same by fire within one-fourth of a mile of any city, town, or village, and every person who puts the carcass of any dead animal, or any offal of any kind, in or upon the borders of any stream, pond, lake, or reservoir, from which water is drawn for the supply of the inhabitants of any city, city and county, or any town, in this State, so that the drainage from such carcass or offal may be taken up by or in such stream, pond, lake, or reservoir, or who allows the carcass of any dead animal, or any offal of any kind, to remain in or upon the borders of any such stream, pond, lake, or reservoir, within the boundaries of any lands owned or occupied by him, or who keeps any horses, mules, cattle, swine, sheep, or live-stock of any kind, penned, corralled, or housed on, over, or on the borders of any such stream, pond, lake, or reservoir, so that the waters thereof shall become polluted by reason thereof, is guilty of a misdemeanor, and upon conviction thereof shall be punished as prescribed in section three hundred and seventy-seven of this Code. [In effect, March 23rd, 1876.]

375. Every person who makes or keeps gunpowder, nitro-glycerine, or other highly explosive substance, within any city or town, or who carries the same through the streets thereof, in any quantity or manner such as is pre-

hibited by law, or by any ordinance of such city or town, is guilty of a misdemeanor.

Dangerous explosives.—The keeping or manufacturing of explosives or inflammable substances in such quantities and places, or in such manner as to endanger life or property, is a nuisance—56 Barb. 72; 1 Johns. 78; 34 Me. 36; 107 Mass. 188; 74 Pa. St. 230; 1 Swan, 213; Thach. C. C. 14; 3 East, 192; Dears. & B. 209; as large quantities of gunpowder kept in populous places—1 Johns. 78; 6 Hill, 292; 56 Barb. 72; 12 Mod. 342; 2 Strange, 1167.

376. Every master of a vessel subject to quarantine or visitation by the quarantine officer, arriving in the port of San Francisco, who refuses or omits—

1. To proceed with and anchor his vessel at the place assigned for quarantine, at the time of his arrival; or,

2. To submit his vessel, cargo, and passengers to the examination of the quarantine officer, and to furnish all necessary information to enable that officer to determine to what length of quarantine and other regulations they ought, respectively, to be subject; or,

3. To remain with his vessel at the quarantine during the period assigned for her quarantine, and while at quarantine to comply with the regulations prescribed by law, and with such as any of the officers of health, by virtue of authority given them by law, shall prescribe in relation to his vessel, his cargo, himself, his passengers, or crew;

—is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding two thousand dollars, or both. [In effect March 9th, 1878.]

See Pol. Code, §§ 3004-3032; id. §§ 3013, 3014, 3017-3019.

377. Every person who willfully violates any of the laws of this State relating to the preservation of the public health, is, unless a different punishment for such violation is prescribed by this Code, punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both.

See *ante*, § 376; Pol. Code, §§ 2978-3063.

378. Every person charged with the performance of any duty under the laws of this State relating to the preservation of the public health, who willfully neg-

lects or refuses to perform the same, is guilty of a misdemeanor.

See Pol. Code, §§ 2978-3063.

379. Every person, not the master or owner, or not authorized to act as pilot under the laws of this State, who pilots or offers to pilot any vessel to or from any port of this State for which there are commissioned or licensed pilots, or who pilots or offers to pilot any vessel to or from any port other than that for which he is commissioned or licensed, and for which there are pilots so commissioned or licensed, is guilty of a misdemeanor. [Approved March 30th, in effect July 1st, 1874.]

See Pol. Code, §§ 2429-2447, 2457-2468, 2476-2491, and note.

380. Every apothecary, druggist, or person carrying on business as a dealer in drugs or medicines, or person employed as clerk or salesman by such person, who, in putting up any drugs or medicines, or making up any prescription, or filling any order for drugs or medicines, willfully, negligently, or ignorantly omits to label the same, or puts an untrue label, stamp, or other designation of contents, upon any box, bottle, or other package containing any drugs or medicines, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of a misdemeanor, or if death ensues, is guilty of a felony.

See 7 N. Y. 397; Civ. Code, §§ 1708, 3333, 3523.

381. Every person who, in putting up in any bag, bale, box, barrel, or other package, any hops, cotton, wool, grain, hay, or other goods usually sold in bags, bales, boxes, barrels, or packages by weight, puts in or conceals therein anything whatever, for the purpose of increasing the weight of such bag, bale, box, barrel, or package, with intent thereby to sell the goods therein, or

to enable another to sell the same, for an increased weight, is punishable by fine of not less than twenty-five dollars for each offense. [Approved March 30th, in effect July 1st, 1874.]

382. Every person who adulterates or dilutes any article of food, drink, drug, medicine, spirituous or malt liquor, or wine, or any article useful in compounding them, with a fraudulent intent to offer the same or cause or permit it to be offered for sale as unadulterated or undiluted, and every person who fraudulently sells, or keeps or offers for sale the same, as unadulterated or undiluted, is guilty of a misdemeanor.

Adulteration of food.—To render unwholesome any food to be consumed is an indictable nuisance—3 Maule & S. 11; 4 Camp. 12; 4 Maule & S. 214. That the party did not know that the provisions were adulterated has been held no defense—2 Allen, 160; 9 Id. 489; 15 Mees. & W. 404; 10 Allen, 199; 103 Mass. 444; 10 R. I. 258; 6 Parker Cr. R. 355; *contra*, Farrell v. State, 32 Ohio St. 456.

383. Every person who knowingly sells, or keeps or offers for sale, or otherwise disposes of any article of food, drink, drug, or medicine, knowing that the same has become tainted, decayed, spoiled, or otherwise unwholesome or unfit to be eaten or drank, with intent to permit the same to be eaten or drank, is guilty of a misdemeanor.

384. Every person who willfully or negligently sets on fire, or causes or procures to be set on fire, any woods, prairies, grasses, or grain, on any lands, is guilty of a misdemeanor.

See Act of 1872, Destruction of Forests, Appendix, p. 713.

385. Every person who, at the burning of a building, disobeys the lawful orders of any public officer or fireman, or offers any resistance to or interferes with the lawful efforts of any fireman or company of firemen to extinguish the same, or engages in any disorderly conduct calculated to prevent the same from being extinguished, or who forbids, prevents, or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor.

See Pol. Code, §§ 3335-3345.

386. Every person who demands or receives compensation for the use of any bridge or ferry, or sets up or keeps any road, bridge, ferry, or constructed ford, for the purpose of receiving any remuneration for the use of the same, without authority of law, is guilty of a misdemeanor.

387. Every person who, having entered into an undertaking to keep and attend a ferry, violates the conditions of such undertaking, is guilty of a misdemeanor.

See §§ 2850, 2854.

388. Every person who willfully rides or drives faster than a walk on or over any toll-bridge, lawfully licensed, is punishable by fine not exceeding twenty dollars.

389. Every person not exempt from paying tolls, who crosses on any ferry or toll-bridge, or passes through any toll-gate, lawfully kept, without paying the toll therefor, and with intent to avoid such payment, is punishable by fine not exceeding twenty dollars.

390. Every person in charge of a locomotive engine, who, before crossing any traveled public way, omits to cause a bell to ring or steam-whistle to sound at the distance of at least eighty rods from the crossing, and up to it, is guilty of a misdemeanor.

See Civ. Code, § 486. A habitual failure to give warnings and signals on intersecting roads is indictable—13 Bush, 288. See Civ. Code, § 486.

391. Every person who is intoxicated while in charge of a locomotive engine, or while acting as conductor or driver upon any railroad train or car, whether propelled by steam or drawn by horses, or while acting as train dispatcher, or as telegraph operator receiving or transmitting dispatches in relation to the movement of trains, is guilty of a misdemeanor.

See Pol. Code, §§ 2920-2933.

392. Every person who, in making up or running railroad trains, places or runs, or causes to be placed or run, any freight car in the rear of passenger cars, is guilty of a

misdemeanor; and if loss of life or limb results from such placing or running, is guilty of felony. The term "freight car," as used in this section, does not include a baggage, express, or mail car.

393. Every engineer, conductor, brakeman, switch-tender, or other officer, agent, or servant of any railroad company, who is guilty of any willful violation or omission of his duty as such officer, agent, or servant, whereby human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor.

394. Every person who willfully exposes himself or another afflicted with any contagious or infectious disease, in any public place or thoroughfare, except in his necessary removal in a manner the least dangerous to the public health, is guilty of a misdemeanor.

395. Every person who willfully makes or publishes any false statement, spreads any false rumor, or employs any other false or fraudulent means or device, with intent to affect the market price of any kind of property, is guilty of a misdemeanor.

396. Every person driving any conveyance drawn by horses, upon any public road or way, who causes or suffers his horses to run, with intent to pass another conveyance, or to prevent such other from passing his own, is guilty of a misdemeanor.

397. Every person who sells or furnishes, or causes to be sold or furnished, intoxicating liquors to any habitual or common drunkard, or Indian, is guilty of a misdemeanor. [Approved March 26th, 1874; in effect sixty days after passage.]

See Act of 1872, Sale of Liquors to Minors, Appendix, p. 716.

398. Every person who sells or furnishes to any Indian any fire-arm, or ammunition therefor, is guilty of a misdemeanor.

399. If the owner of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and such animal, while so at large, or while not kept with ordinary care, kills any human being who has taken all the precautions which the circumstances permitted, or which a reasonable person would ordinarily take in the same situation, is guilty of a felony.

400. Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony. [Approved March 30th, in effect July 1st, 1874.]

400. Every person exhibiting the deformities of another, or his own deformities, for hire, is guilty of a misdemeanor; and every person who shall by any artificial means give to any person the appearance of a deformity, and shall exhibit such person for hire, shall be guilty of a misdemeanor. [Approved February 4th, 1874.]

400. Any person who shall knowingly sell, or offer for sale, or use, or expose, or who shall cause or procure to be sold or offered for sale, or used, or exposed, any horse, mule, or other animal having the disease known as glanders, or farcy, shall be guilty of a misdemeanor. [In effect April 16th, 1880.]

401. Every animal having glanders, or farcy, shall at once be deprived of life by the owner or person having charge thereof, upon discovery or knowledge of its condition; and any such owner or person omitting or refusing to comply with the provision of this section shall be guilty of a misdemeanor. [In effect April 16th, 1880.]

401. Every person who adulterates candy, by using in its manufacture terra alba, or any other deleterious substance or substances, or who sells or keeps for sale any candy or candies adulterated with terra alba, or any other deleterious substance or substances, is guilty of a misdemeanor. [In effect March 16th, 1878.]

TITLE XI.

Of Crimes against the Public Peace.

- § 403. Disturbance of public meetings, other than religious or political.
- § 404. "Riot" defined.
- § 405. Riot, punishment of.
- § 406. "Rout" defined.
- § 407. "Unlawful assembly" defined.
- § 408. Punishment of rout and unlawful assembly.
- § 409. Remaining present at place of riot, etc., after warning to disperse.
- § 410. Magistrates neglecting or refusing to disperse rioters.
- § 411. Consequence of resisting process after a county has been declared in a state of insurrection.
- § 412. Prize fights.
- § 413. Persons present at prize fights.
- § 414. Leaving the State to engage in prize fights.
- § 415. Disturbing the peace in night-time.
- § 416. Refusing to disperse upon lawful command.
- § 417. Exhibiting deadly weapon in rude, etc., manner, or using the same unlawfully.
- § 418. Forcible entry and detainer.
- § 419. Returning to take possession of lands after being removed by legal proceedings.
- § 420. Inciting riot. [Repealed.]

403. Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting, not unlawful in its character, other than such as is mentioned in sections fifty-nine and three hundred and two, is guilty of a misdemeanor.

Disturbing meetings.—A disturbance of any public meeting is, at common law, indictable—33 Barb. 548; 2 Grant Cas. 406; 58 Ind. 68; 53 Me. 125; 2 McCord, 117; 3 Tex. Ct. App. 116; as a town meeting—16 Mass. 385; or a meeting of school directors—59 Pa. St. 256. To molest and disturb have a well-defined meaning—53 Ala. 398. The natural tendency of the act must be to disturb the assemblage—28 Ind. 364; Smith (Ind.) 408; and the disturbance must be willful and designed—1 Gray, 480. A man may hiss an actor on the stage—5 Tex. Ct. App. 116; 1 Craw. & D. 156; but not for the purpose of ruining the play or the actor—2 Camp. 358.

404. Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

Riot.—Riot is a tumultuous disturbance of the peace by persons assembled of their own authority, with intent of putting their designs into execution in a violent manner, whether the object be lawful or unlawful—5 Blackf. 365; Addis. 190; 1 Hill, (S. C.) 361; 5 Ill. 189; 61 Id. 167; 4 Ind. 589; 10 Id. 459; 42 Id. 273; 10 Mass. 548; 2 McCord, 117; 45 N. H. 83; 3 Rich. 337; Rice, 258. There must be force or violence, or acts tending thereto, and calculated to strike terror into the people—10 Mass. 518; 11 Ind. 234; 33 Me. 554; 2 Ld. Raym. 1210; 4 Car. & P. 373; and if one person be alarmed it is sufficient—Addis. 277; 1 Spear, 13; 7 Rich. 5. It is enough if the action of the parties be so violent and tumultuous as to be likely to cause fright, and if individuals are frightened—7 Rich. 5; 1 Spear, 13; by threatening language or other misbehavior—72 N. C. 25; 13 Rich. 93; and an attempt to commit an act of violence—70 N. C. 66; but personal violence need not be committed—2 Camp. 369; and the act done or attempted must be unlawful—14 Mo. 147; as disturbing a meeting lawfully held—1 Gray, 476. Even a lawful act may be done in such a violent and tumultuous manner as to constitute a riot—42 Ind. 273; 70 N. C. 66; 51 Ill. 286; see 18 Me. 346; 6 Yerg. 535; 1 Hill, (S. C.) 362; 14 Mo. 147; as removing a nuisance—5 Ill. 179; 13 Rich. 93; or raising a liberty pole—Addis. 274.

The assemblage.—The assemblage must be unlawful—1 Ired. 30; yet an innocent assembly may become riotous by subsequent riotous acts—2 McCord, 117; 18 Me. 346; 42 Ind. 273; 51 Ill. 286; 70 N. C. 66; and persons intending only a frolic, may so change their course as to commit a riot—7 Rich. 5; as misbehaving at a dance—13 Ind. 260; or disorderly behavior at a town-meeting—16 Mass. 385; so a charivari—4 Ind. 114; by making noises, etc., in the night-time—Id.; or going through the streets crying "fire," blowing horns, etc., or kicking a foot-ball in a noisy and tumultuous manner, to the terror of the people—Rice, 257. In North Carolina, where the assemblage is lawful, subsequent illegal acts of the members will not make them rioters—1 Ired. 30.

Numbers engaged.—At common law three or more persons must concur to constitute the offense—4 Blackf. 72; 9 Ind. 565; 10 Id. 459; 11 Id. 287; 6 Blackf. 37; 22 Ga. 478; 30 Id. 27; 3 Yerg. 428; 3 Rich. 337; 2 Spear, 599; 1 Ashm. 46; 1 Bay, 358; 2 McCord, 462; Salk. 593; Holt. 636; 3 Burr, 1262; 1 Ld. Raym. 484; 9 Car. & P. 91; see 42 Ind. 273; 51 Ga. 374. A riot may be committed where only two persons are actively engaged, if a third person is present aiding and abetting them—33 Me. 554; 30 Ga. 77. *Contra*, 1 Morris, 142. The disturbance of the public peace must be in the execution of some private object—3 Spear, 599; 3 Rich. 337; 23 Law Reporter, 705.

405. Every person who participates in any riot is punishable by imprisonment in the county jail not exceeding two years, or by fine not exceeding two thousand dollars, or both.

Liability of parties.—Riot at common law is a misdemeanor, punishable by fine and imprisonment—6 Car. & P. 81. All who encourage, incite, promote, or take part in it, whether by words, signs, or gestures, are principals—55 Barb. 606; 33 Me. 496; 33 Id. 554; 11 Met. 66; 2 Mo. 268; 22 Vt. 32; Addis. 277; 9 Car. & P. 437; but mere presence alone

will not render one liable—11 Cox C. C. 330. A person who commences a riot, but abandons it before it is finished, is liable for the whole—13 Rich. 93; 3 Cox C. C. 288. Women may be guilty of the offense—2 Ld. Raym. 1284; and a minor may be convicted of this offense—1 Arch. C. Pr. 13; but an infant under the age of discretion cannot—2 Ld. Raym. 1284.

406. Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act, which would be a riot if actually committed, such assembly is a rout.

Rout.—A disturbance of the peace by persons assembling with intent to do a riotous act, and actually moving toward its execution, is a rout—2 Whart. Cr. L. 8th ed. § 1536; 1 Russ. Cr. 9th ed. 378. At common law at least three persons are necessary to constitute the offense—1 Hawk. P. C. ch. 65, § 1. Where the requisite number of persons meet, stake money, and purpose to engage in a prize-fight, it is a rout—2 Spear, 599; and all present aiding and encouraging are equally guilty—16 Mass. 389; 1 Root, 275; 3 Mon. 216.

407. Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

Unlawful assembly.—At common law it is an assemblage of three or more persons with intent to do that which if done would make them rioters, but making no motion toward doing the act—18 Me. 346; 2 McCord, 117; 3 Barn. & Ald. 566; 4 Car. & P. 373; 5 Id. 154; 9 Id. 431; 6 Up. Can. C. P. 372; as an assembly to witness a prize-fight—2 Car. & P. 234; 4 Id. 537, or an assemblage met to go night-poaching—6 Car. & P. 571. To constitute the offense no overt act of violence is necessary—5 Up. Can. C. P. 372. Persons lawfully assembled may become an unlawful assembly if their conduct becomes such as would have made them an unlawful assembly at the outset—18 Me. 346; 2 McCord, 117; 1 Hill, S. C. 362; 6 Yerg. 525; 4 Pa. L. J. 33; and see 14 Mo. 147; 3 Stark. 79; 9 Car. & P. 91.

408. Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

Liability of parties.—All present aiding are equally guilty—16 Mass. 389; 1 Root, 275; 3 Mon. 216.

409. Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

410. If a magistrate or officer, having notice of an unlawful or riotous assembly, mentioned in this chapter,

neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

Suppression of riots.—A justice of the peace is liable for not trying to suppress a riot—1 Yeates, 419; so, to refuse to aid an officer in trying to suppress a riot is an offense—see 9 Mo. 268; Addis. 277; 1 Car. & M. 314.

411. A person who, after the publication of the proclamation authorized by section seven hundred and thirty-two, resists or aids in resisting the execution of process in any county declared to be in a state of insurrection, or who aids or attempts the rescue or escape of another from lawful custody or confinement, or who resists, or aids in resisting any force ordered out by the governor to quell or suppress an insurrection, is punishable by imprisonment in the State prison not less than two years.

See *ante*, § 148; *post*, 731.

412. Every person who engages in, instigates, encourages, or promotes any ring or prize fight, or any other premeditated fight or contention, (without deadly weapons) either as principal, aid, second, umpire, surgeon, or otherwise, is punishable by imprisonment in the State prison not exceeding two years.

Affray.—An affray is a fighting by mutual consent by two or more persons in some public place, to the terror of the people—6 Dana, 295; 5 Humph. 519; 5 Yerg. 356; 13 Ga. 322; 53 Ala. 640; 10 Mass. 518; 6 J. J. Mar. 615; see 15 Ark. 204; either actual or presumptive terror—5 Strob. 53; 35 Ala. 392. There must be actual fighting by at least two persons—53 Ala. 640; 1 Blackf. 377; 5 Yerg. 356; 4 Humph. 429; see 4 Hawks, 356; 2 Tenn. 198. It includes assault and battery—40 Ind. 18; 8 C. 1 Green C. R. 554; 53 Ala. 640; 15 Ark. 204. The place of fighting must be public—21 Ala. 218; 22 Id. 15; 13 Ga. 322; 3 Helsk. 278; 5 Strob. 53; 8 Humph. 84; 23 Ind. 206.

Liability of parties.—All persons present, aiding and encouraging, are equally guilty—13 Ga. 322; 16 Mass. 389; 1 Root, 275; 3 Mon. 216; see 71 N. C. 288. Every person concerned in a duel is equally responsible—1 Leigh. 603. As to surgeons—see 24 Gratt. 624.

413. Every person willfully present as a spectator at any fight or contention mentioned in the preceding section, is guilty of a misdemeanor.

414. Every person who leaves this State, with intent to evade any of the provisions of the last two sections,

and to commit any act out of this State, such as is prohibited by them, and who does any act which would be punishable under these provisions, if committed within this State, is punishable in the same manner as he would have been in case such act had been committed within this State.

Leaving State to fight a duel.—A challenge to fight in another State is penally cognizable in the State in which the challenge is issued—3 Brev. 243; 1 Treadl. 167; 58 Ga. 332; 1 Hawks, 487; see 12 Ala. 276; 2 Camp. 506; nor is it necessary to prove that the challenge ever reached its destination—2 Camp. 506. The offense is continuous and is triable in the State where the challenge issued—Thach. C. C. 390; 3 Brev. 243; 58 Ga. 332; 1 Hawks, 487; see 12 Ala. 276; 2 Camp. 506.

415. Every person who maliciously and willfully disturbs the peace of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse-race, either for a wager or for amusement, or fires any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor; and upon conviction by any court of competent jurisdiction, shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the court. [In effect March 20th, 1878.]

Breach of peace.—All acts tending to disturb the public peace are indictable at common law—see 1 Bish. C. L. 6th ed. § 533; acts by which the peace and security of the public are disturbed—see 4 Bl. Com. 142. There need not be such conduct as amounts to assault and battery—29 Conn. 72. The following are examples of the offense at common law: Making loud noises, etc., in the night-time—4 Ind. 114; loud and violent language, opprobrious epithets, and exclamations attracting crowds, even when committed in one's own house—99 Mass. 497. The offense of a common brawler may be committed by mere epithets used in the heat of private quarrel—99 Mass. 497. Driving a carriage through the streets at a rate such as to endanger the safety of pedestrians—Peters C. C. 390; 3 Wheel. C. C. 304; riding or going armed with dangerous or unusual weapons—3 Ired. 418; anything that tends to provoke or excite others to break the peace—4 Bl. Com. 150; as spreading false news to create discord between persons—4 Bl. Com.

149; false and pretended prophecies—*id.*; entering on land by force and throwing out a person who has a naked possession—7 *Ind.* 549.

Challenging to fight—is the inciting, or inviting, or provoking another to fight—*Hob.* 215. A challenge to fight without deadly weapons is indictable as an attempt, or as a breach of the peace—3 *Brev.* 243; 1 *Hawks.* 487; 2 *Law Reporter*, 148; 34 *Ill.* 486; 1 *Dana*, 524. No particular form of words is necessary, it is a question of fact for the jury—12 *Ala.* 276; see 3 *Dana*, 418; 6 *J. J. Marsh.* 120; 1 *Hawks.* 487; 6 *Blackf.* 20; 3 *Brev.* 243; 1 *McMull.* 126; but the mere words liar, knave, or the like, do not directly tend to a breach of the peace, as a challenge, but words which tend to a breach of the peace may be indictable—1 *Dana*, 524; 2 *Ld. Raym.* 1031. See *Desty's Crim. Law*, § 95 a.

"Maliciously" and "willfully."—See *ante*, § 7, subd. 4; *id.* subd. 1.

416. If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor.

417. Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry, and threatening manner, or who, in any manner, unlawfully uses the same, in any fight or quarrel, is guilty of a misdemeanor.

Exhibiting weapons.—The appearance in public, armed with a dangerous weapon, is an indictable offense—3 *Ired.* 418.

418. Every person using or procuring, encouraging or assisting another to use any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and in the manner allowed by law, is guilty of a misdemeanor.

Forcible entry and detainer.—A forcible entry and forcible detainer is indictable at common law—3 *Mo.* 127; 4 *Cush.* 141; 8 *Term Rep.* 357; 3 *Burr.* 1731; and they are distinct offenses—8 *Cowen*, 226; 1 *Hall*, N. Y. 240; 4 *Johns.* 198; 1 *Jones*, (N. C.) 290; 1 *Serg. & R.* 124; 6 *Id.* 232; 8 *Gratt.* 708. Indictment lies whenever the unlawful entry is made with force—3 *Brev.* 413; 2 *Const. S. C.* 489. The entry must have been made when the proprietor was in quiet possession of the property—3 *Ired.* 315; 3 *Har. (Del.)* 206; 1 *Ashm.* 140, and must be attended with force and intimidation—1 *Ashm.* 140; but title is immaterial—4 *Conn.* 79; 1 *Dall.* 68; 8 *Cowen*, 226; 1 *Hall*, 240; 4 *Johns.* 198; 13 *Up. Can. Q. B.* 521; 4 *Man. & R.* 471. Force is necessary, exceeding a bare trespass, and giving reasonable grounds for terror; 10 *Ired.* 39; 1 *Ashm.* 140; 1 *Brewst.* 509; 1 *Har. (Del.)* 520; 5 *Binn.* 277; 4 *Ired.* 305; 5 *Id.* 452; 13 *Id.* 348; 4 *Jones*, (N. C.) 315; 1 *Me.* 22; 5 *Car. & P.* 201; *Ryan & M.* 27. There must be a show of force, as with weapons or a multitude of people, so as to involve a breach of the peace—24 *Barb.* 16; 10 *Ired.* 38; 6 *Baxt.* (Tenn.) 496; 7 *Id.* 109; 4 *Jones*, (N. C.) 316. In some States, a civil remedy is given by statute—10 *Mass.* 403; 3 *Pick.* 31; 9 *Wend.* 62; 8 *Cowen*, 226; 4 *Johns.* 198; but it remains an indictable offense in those States

where the most summary civil remedies are given—5 Binn. 277; 1 Brev. 119; 2 Dev. 120; 3 Har. (Del.) 205; 3 Mass. 215; 1 Me. 22. See 13 Pa. St. 392; but see 2 Pars. Cas. 411. See Desty's Crim. Law, §§ 99 b, c; and see Civ. Code, §§ 1159-1175.

419. Every person who has been removed from any lands by process of law, or who has removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal, or officer, and who afterwards unlawfully returns to settle, reside upon, or take possession of such lands, is guilty of a misdemeanor.

420. Repealed. [In effect February 7th, 1880.]

TITLE XII.

Of Crimes against the Revenue and Property of this State.

- § 424. Embezzlement and falsification of accounts by public officers.
- § 425. Officers neglecting to pay over public moneys.
- § 426. "Public moneys," as used in the preceding section, defined.
- § 427. Failure to pay over fines and forfeitures received, a *mis de meanor*.
- § 428. Obstructing officer in collecting revenue.
- § 429. Refusing to give assessor list of property, or giving false name.
- § 430. Making false statements, not under oath, in reference to taxes.
- § 431. Delivering receipts for poll-taxes, other than prescribed by law, or collecting poll-taxes, etc., without giving the receipt prescribed by law.
- § 432. Having blank receipts for licenses, etc., other than those prescribed by law.
- § 433. *Repealed.*
- § 434. Refusing to give name of persons in employment, etc.
- § 435. Carrying on business without license.
- § 436. Unlawfully acting as auctioneer.
- § 437. *Repealed.*
- § 438. *Repealed.*
- § 439. Effecting insurance on account of foreign companies that have not complied with the laws of this State.
- § 440. Officer charged with collection, etc., of revenue, refusing to permit inspection of his books.
- § 441. Board of examiners, controller, and treasurer neglecting certain duties.
- § 442. Having State arms, etc.
- § 443. Selling State arms, etc.

424. Each officer of this State, or of any county, city, town, or district of this State, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who either—

1. Without authority of law, appropriates the same, or any portion thereof, to his own use, or to the use of another; or,

2. Loans the same, or any portion thereof; or, having the possession or control of any public money, makes a profit out of, or uses the same for any purpose not authorized by law; or

3. Fails to keep the same in his possession until disbursed or paid out by authority of law; or,

4. Unlawfully deposits the same, or any portion thereof, in any bank, or with any banker or other person; or,

5. Changes or converts any portion thereof from coin into currency, or from currency into coin or other currency, without authority of law; or,

6. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,

7. Fraudulently alters, falsifies, conceals, destroys, or obliterates any such account; or,

8. Willfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon such moneys by competent authority; or,

9. Willfully omits to transfer the same, when such transfer is required by law; or,

10. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same;

—is punishable by imprisonment in the State prison for not less than one nor more than ten years, and is disqualified from holding any office in this State. [In effect April 16th, 1880.]

Fraud and breach of trust.—An office is a particular duty, charge, or trust; a right to exercise a public function—12 Ind. 569; 71d. 157; 59 Ala. 73; and to commit any fraud or breach of trust affecting the public, is indictable—see 2 Whart. C. L. 8th ed. § 1572 a. A corrupt motive is essential to constitute the offense—6 B. Mon. 171; 1 Leigh, 709; 15 Wend. 277; 2 Doug. 428; 1 Term. Rep. 653. The existence of a motive may be inferred from the nature of the act, or from the circumstances of the whole case—24 Minn. 158; 1 Salk. 380; 3 Doug. 327. They are liable for embezzlement of public funds—69 Me. 22; or the conversion of any portion of the public money intrusted to them—91 Ill. 330. A clerk of a court who fraudulently withholds money belonging to an estate is guilty of contempt—1 Blackf. 166. An indictment lies against

a public officer for the fraudulent conversion of public moneys, although he and his sureties are liable on their official bond—62 Me. 106.

Subd. 5. In Georgia, a county treasurer, buying an order on the county for less than its par value, is indictable—47 Ga. 522.

Subd. 6. Officers are liable for a habitual neglect to account for small sums, and a gross neglect in keeping accounts is presumptive of guilty intent—6 B. Mon. 171; so, overseers of the poor are indictable for not accounting for moneys received for supplying the poor—see 64 Cal. 408; 2 Kerr, 643.

Subd. 10. Town tax collectors are public officers—62 Me. 106; and a *de facto* tax collector is punishable for embezzlement of money coming into his hands by virtue of his office—69 Me. 22; but his failure to pay over the moneys to the proper authority, although unexplained, is not presumption of a felonious appropriation—54 Cal. 64. Reports of public moneys received apply to ministerial officers—2 Tex. Ct. App. 525. A selectman is a public officer, and may be a receiver of public moneys—63 N. H. 610. See 62 Ill. 127.

425. Every officer charged with the receipt, safe-keeping, or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony.

426. The phrase "public moneys," as used in the two preceding sections, includes all bonds and evidence of indebtedness, and all moneys belonging to the State, or any city, county, town, or district therein, and all moneys, bonds, and evidences of indebtedness received or held by State, county, district, city, or town officers in their official capacity.

427. If any clerk, justice of the peace, sheriff, or constable, who receives any fine or forfeiture, refuses or neglects to pay over the same according to law, and within thirty days after the receipt thereof, he is guilty of a misdemeanor.

See *post*, §§ 1457, 1570.

428. Every person who willfully obstructs or hinders any public officer from collecting any revenue, taxes, or other sums of money in which the people of this State are interested, and which such officer is by law empowered to collect, is guilty of a misdemeanor.

429. Every person who unlawfully refuses, upon demand, to give to any county assessor a list of his property subject to taxation, or to swear to such list, or who gives

a false name or fraudulently refuses to give his true name to any assessor, when demanded by such assessor in the discharge of his official duties, is guilty of a misdemeanor.

See Pol. Code, §§ 3629, 3631.

430. Every person who, in making any statement, not upon oath, oral, or written, which is required or authorized by law to be made, as the basis of imposing any tax or assessment, or of an application to reduce any tax or assessment, willfully states anything which he knows to be false, is guilty of a misdemeanor.

See Pol. Code, §§ 3629-3631, 3674, 3675.

431. Every person who uses or gives any receipt, except that prescribed by law, as evidence of the payment of any poll-tax, road-tax, or license of any kind, or who receives payment of such tax or license without delivering the receipt prescribed by law, or who inserts the name of more than one person therein, is guilty of a misdemeanor.

See Pol. Code, Licenses, §§ 3356-3385; Revenues, §§ 3807-3892.

432. Every person who has in his possession, with intent to circulate or sell, any blank licenses or poll-tax receipts other than those furnished by the controller of state or county auditor, is guilty of felony.

See Pol. Code, §§ 3839-3845.

433. [Was repealed by an act entitled "An Act to amend and in relation to THE POLITICAL, CIVIL, and PENAL CODES, and THE CODE OF CIVIL PROCEDURE," approved April first, eighteen hundred and seventy-two, now on file in the office of the secretary of state.]

434. Every person who, when requested by the collector of taxes or licenses, refuses to give to such collector the name and residence of each man in his employment, or to give such collector access to the building or place where such men are employed, is guilty of a misdemeanor.

See Pol. Code, §§ 3848-3850.

435. Every person who commences or carries on any business, trade, profession, or calling, for the transaction

or carrying on of which a license is required by any law of this State, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor.

License Law of April 12th, 1880.—A Chinaman cannot justify a violation of § 3381, of the Pol. Code, in selling without a license, by claiming that he comes within the prohibition of the above act—6 Pac. C. L. J. 116. He must pay a license—id. See Pol. Code, Licenses, §§ 3356-3386.

436. Every person who acts as an auctioneer in violation of the laws of this State relating to auctions and auctioneers, is guilty of a misdemeanor.

See Pol. Code, §§ 3284-3292, 3376.

437. [Repealed by Act of April first, eighteen hundred and seventy-two.]

438. [Repealed by Act of April first, eighteen hundred and seventy-two.]

439. Every person who in this State procures, or agrees to procure, any insurance for a resident of this State, from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of this State relating to insurance, is guilty of a misdemeanor.

See Pol. Code, § 623.

440. Every officer charged with the collection, receipt, or disbursement of any portion of the revenue of this State, who, upon demand, fails or refuses to permit the controller or attorney-general to inspect his books, papers, receipts, and records pertaining to his office, is guilty of a misdemeanor.

441. Every member of the board of examiners, and every controller or State treasurer, who violates any of the provisions of the laws of this State relating to the board of examiners, or prescribing its powers and duties, is guilty of a felony.

See Pol. Code, §§ 654-685.

442. Every person who unlawfully retains in his possession any arms, equipments, clothing, or military stores

belonging to the State, or the property of any company of the State militia, is guilty of a misdemeanor.

See Pol. Code, §§ 1963-1968.

443. Every member of the State militia who unlawfully disposes of any arms, equipments, clothing, or military stores, the property of this State, or of any company of the State militia, is guilty of a misdemeanor.

TITLE XIII.

Of Crimes against Property.

- CHAP. I. ARSON, §§ 447-55.
- II. BURGLARY AND HOUSEBREAKING, §§ 459-63.
- III. HAVING POSSESSION OF BURGLARIOUS INSTRUMENTS AND DEADLY WEAPONS, §§ 466-7.
- IV. FORGERY AND COUNTERFEITING, §§ 470-82.
- V. LARCENY, §§ 484-502.
- VI. EMBEZZLEMENT, §§ 503-14.
- VII. EXTORTION, §§ 518-25.
- VIII. FALSE PERSONATION AND CHEATS, §§ 528-36.
- IX. FRAUDULENTLY FITTING OUT AND DESTROYING VESSELS, §§ 539-41.
- X. FRAUDULENTLY KEEPING POSSESSION OF WRECKED PROPERTY, §§ 544-5.
- XI. FRAUDULENT DESTRUCTION OF PROPERTY INSURED, §§ 548-9.
- XII. FALSE WEIGHTS AND MEASURES, §§ 552-5.
- XIII. FRAUDULENT INSOLVENCIES BY CORPORATIONS, AND OTHER FRAUDS IN THEIR MANAGEMENT, §§ 557-72.
- XIV. FRAUDULENT ISSUE OF DOCUMENTS OF TITLE TO MERCHANDISE, §§ 577-83.
- XV. MALICIOUS INJURIES TO RAILROAD BRIDGES, HIGHWAYS, BRIDGES, AND TELEGRAPHS, §§ 587-92.
- PEN. CODE—16.

CHAPTER I.

ARSON.

- § 447. Arson defined.
- § 448. "Building" defined.
- § 449. "Inhabited building" defined.
- § 450. "Night-time" defined.
- § 451. "Burning" defined.
- § 452. Ownership of the building.
- § 453. Degrees of arson.
- § 454. Arson of the first degree. Arson of the second degree.
- § 455. Punishment of arson.

447. Arson is the willful and malicious burning of a building, with intent to destroy it.

Arson defined.—Arson is the willful and malicious burning of the house of another—51 Cal. 320; 12 Bush, 243; 5 Ired. 350; 18 Johns. 115; 12 Vt. 93; 11 Up. Can. C. P. 69. It is a crime against the security of the dwelling-house as such, and the possession, and not against the building as property—44 Cal. 434; 26 Mich. 106; 1 Green C. R. 547; 29 Conn. 342; see 52 Ala. 357; 12 Bush, 243; 3 Ired. 570; 2 Johns. 105; 61 Mo. 276; 19 N. Y. 537; 71 N. C. 88. The value of the property is not an element—52 Ala. 345. Malice and willfulness are essential ingredients, and no negligence and mischance can make one guilty—28 Miss. 100; 49 Ala. 27, although done in the pursuance of an illegal act—5 Ired. 350; unless in the commission of a felony—15 Ill. 516; but it is not necessary that there be a design to produce death—53 Miss. 384; 1 Parker Cr. R. 560; 15 Wis. 13. Malice implies an evil and malicious intent, however general—3 Chit. C. L. 1120; as, where the design is to burn one house and he burns another—32 Vt. 138; and the act which results in burning another's house need not be a felonious act—2 East P. C. 1030, 1031. The intent must be malicious—28 Miss. 100; 2 East P. C. 1033; or, to injure or defraud—32 Cal. 160; 37 id. 274; 78 N. C. 552; as, an insurance company—51 N. H. 176; 19 N. Y. 537; 1 Parker Cr. R. 560; and a possibility of fraud is sufficient—1 Whart. C. L. 8th ed. § 843. See generally, 114 Mass. 272; 28 Ala. 71; Russ. & R. C. C. 138; 4 Post. & F. 1102. Though it need not be to injure or defraud any particular person—Law R. 1 C. C. 344. The intent may be inferred from the facts—51 Cal. 468; 52 Ala. 345; 51 Ga. 612; 63 Me. 128; 12 La. An. 382; 119 Mass. 354; 10 Met. 422; 41 Tex. 598; 47 Ill. 533; 2 Car. & K. 306; 5 Cox C. C. 138; Russ. & R. C. C. 209; and, in pursuance of the intent, to set fire to any combustible matter in the building is an offense at common law—Thach. C. C. 240. See Desty's Crim. Law, title Arson.

448. Any house, edifice, structure, vessel, or other erection, capable of affording shelter for human beings, or appurtenant to or connected with an erection so adapted, is a "building," within the meaning of this chapter.

The building.—Any edifice capable of affording shelter for human beings is a "building"—51 Cal. 320; 34 Id. 245. It need not be a finished structure; it is sufficient if it is connected and entire—12 Cox C. C. 106; Law R. 1 C. C. 338; its state of completeness is a question of fact—1 Met. 258; 12 Cox C. C. 106; Law R. 1 C. C. 338; but the remains of a wooden house after a fire is not a building—32 Up. Can. Q. B. 429; 8 C. 1 Green C. R. 204. A church is a building within the statute—1 Leach, 318; 1d. 320; or a school-house—2 Root, 516; 4 Gill & J. 402; 5 Mon. 156; or a building removed by a city, and fitted up for public use—2 Allen, 159; or a vessel—see Brown Adm. 156. In arson, house, shop, work-shop, etc., have the same meaning as in cases of burglary—5 Up. Can. Q. B. (O. S.) 522. A warehouse means any building used as such at the time—10 Ohio St. 287. Where there are no interior communications between two parts of a house, the separately occupied parts are considered as separate buildings—29 Conn. 342. See Desty's Crim. Law, titles ARSON, BURGLARY.

449. Any building which has usually been occupied by any person lodging therein at night is an "inhabited building," within the meaning of this chapter.

Habitation.—Any building is a dwelling-house which is wholly or in part usually occupied by persons lodging therein at night—1 Parker Cr. R. 252. Every house for dwelling and habitation is taken to be a mansion-house—1 Ga. 339. House means not only the dwelling but all out-houses which are parcel thereof, such as barns and stables—3 Dutch. 323; 8 Jones (N. C.), 354; 1d. 455; 1d. 459; 63 N. C. 493; 4 Conn. 47; 4 Dev. & B. 185; 46 Ala. 30; 3 Rich. 242; 31 Me. 523; 2 Mich. 250; 5 Car. & P. 535; 13 Gratt. 763. A jail is an inhabited dwelling—18 Johns. 115; 41 Tex. 601; 4 Call. 109; 5 Ired. 350; 53 Ga. 33; *contra*, 49 Ala. 30; 1d. 33; 4 Leigh. 683; and see 22 Amer. Rep. 255. Where the entrance to a jail was through a dwelling-house, the entire structure is a house—29 Conn. 245; 2 W. Black. 683. Curtilage means a court-yard or the space within any inclosure round a dwelling-house—10 Cush. 478, and includes a summer-house—Russ. & R. 69, and a barn with hay and grain in it—5 Watts & S. 385; 1 Moody C. C. 239; *contra*, 81 Ill. 565; or a barn communicating with the dwelling—2 Mich. 250; or a building thirty-six feet distant, used as a dormitory for the owner's servants—8 Mich. 150.

450. The phrase "night-time," as used in this chapter, means the period between sunset and sunrise.

See sec. 463 and note.

451. To constitute a burning, within the meaning of this chapter, it is not necessary that the building set on fire should have been destroyed. It is sufficient that fire is applied so as to take effect upon any part of the substance of the building.

The burning.—Burning is an essential ingredient of the crime—29 Ga. 105; 24 Ark. 44; 3 Ired. 570; 16 Johns. 203; 16 Mass. 105; 40 Ala. 659; 2 Term. Rep. 255; but the house need not be entirely consumed; it is sufficient if any part is burned—5 Ired. 350; 110 Mass. 403. The offense is complete, although the fire be put out, or go out of itself—5 Ired. 350; 3 Id. 570; 16 Johns. 203; 16 Mass. 105. That something in the house was burned is not sufficient—40 Ala. 659; 1 Car. & M. 541. It is not essential that the woodwork of the house should blaze—Ryan & M. 396; 1 Car. & M. 541; if the wood be charred so as to destroy its

fiber it is sufficient—48 Cal. 354; 50 id. 304; 3 Ired. 570; 5 id. 350; 18 Johns. 115; 110 Mass. 403; 1 Car. & M. 541; 9 Car. & P. 45. The sufficiency of the burning is a question of fact—5 Cush. 427.

452. To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning another person was rightfully in possession of, or was actually occupying such building, or any part thereof.

Ownership.—It is not arson to burn one's own property—8 Gratt. 627; 2 Pick. 320; 12 Up. Can. C. P. 163, unless it be accompanied by an injury to or a design to injure some other person—2 Pick. 325; 5 Stewt. & P. 175; 2 East P. C. 1031; Cro. Car. 377; Cald. 397; but see 19 N. Y. 537; 51 N. H. 176; 12 La. An. 382. A husband cannot be guilty of arson in burning the house occupied by himself and wife—26 Mich. 106; S. C. 1 Green C. R. 547; nor a wife for setting fire to her husband's house—1 Moody C. C. 182; but a person setting fire to a house in the city, the house being occupied by himself and other tenants, is a great misdemeanor—5 City H. Rec. 851; so, if the owner of a building set fire to it with intent to burn the adjoining property, he is guilty of arson—3 Rich. 242; 47 Ill. 533; or burning his house to injure an insurer—29 Cal. 257; 32 id. 160; 1 Parker Cr. R. 560; 2 La. An. 157; see 28 Ala. 71; Russ. & R. 138; 4 Fost. & F. 1102. The building must be the property of another, but such a possession as gives a special property while it exists is sufficient—12 Conn. 487; 2 Johns. 105. The tenure or interest in the building is not to be considered—52 Ala. 357; 2 Johns. 205, as mortgagor or mortgagee—1 Leach, 218; id. 242; id. 220; Cro. Car. 376; Cald. 397; see 7 Cold. 359. At common law a tenant cannot be indicted for willfully burning the house that he lives in—12 Conn. 487; 3 Dutch. 323; 3 Blackf. 465; 1 Leach, 218; id. 220; id. 242; id. 253; but under the statute a lessee may be guilty of arson for burning the property of the lessor or other property adjoining—50 Cal. 304; 19 N. Y. 537; 1 Parker Cr. R. 560; 5 Stewt. & P. 175; 10 Ohio St. 287; 61 Mo. 276; 2 East P. C. 1030; id. 1031. If the lessor, being the general owner, burns the property while occupied by the lessee, he is guilty—2 Johns. 105; 13 Conn. 487; 7 Blackf. 168; 29 Conn. 342; 8 Gratt. 635; 110 Mass. 503; 1 Moody C. C. 344. One entitled to dower may be guilty—5 Stewt. & P. 175; 8 Gratt. 624; 5 Barn. & Ald. 27; or a servant who usually dwells there while the legal possession is in another—2 Pick. 325; 2 East P. C. 1027; id. 1034; 1 Leach. 246; but a servant who sets fire to his master's house by his procurement is not guilty—66 Me. 307; 22 Amer. Rep. 569.

453. Arson is divided into two degrees.

Degrees of arson—53 Cal. 627.

454. Maliciously burning in the night-time an inhabited building in which there is at the time some human being, is arson in the first degree. All other kinds of arson are of the second degree.

Occupation.—Occupation is an essential element of the offense of arson—47 Ga. 572. So, an unfinished building not yet occupied is not within the purview of the statute—20 Ind. 242; id. 219; 20 Conn. 245; 45 N. Y. 153; 10 Cush. 478; 13 Gratt. 763; *contra*, 1 Met. 258; 4 Ga. 335; 4 Strob. 372. That it was intended for occupancy, or is capable of be-

ing occupied, is not sufficient—33 Me. 30; 31 id. 523; 3 Cush. 529; or if it was merely casually occupied—13 Gratt. 763; or if the occupants be absent without intent to return—10 Cush. 478; 13 Gratt. 763. But if the house is burned during a temporary absence, it is the burning of an occupied dwelling—48 Ga. 116; 33 Me. 30; see 31 id. 523; 3 Cush. 529; 10 id. 478; 20 Conn. 245. But it must be usually dwelt in—53 Miss. 384; or occasionally used—4 Ga. 342; and it is immaterial whether the person charged had knowledge of its occupancy—1 Parker Cr. R. 252.

455. Arson is punishable by imprisonment in the State prison, as follows:

1. Arson in the first degree, for not less than two years.
2. Arson in the second degree, for not less than one nor more than ten years.

CHAPTER II.

BURGLARY AND HOUSEBREAKING.

- § 459. "Burglary" defined.
- § 460. Punishment of burglary.
- § 461. "Housebreaking" defined.
- § 462. Punishment of housebreaking.
- § 463. "Night-time" defined.

459. Every person who enters any house, room, apartment tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, or railroad car, with intent to commit grand or petit larceny, or any felony, is guilty of burglary. [Approved Feb. 9th, in effect May 1st, 1876.]

Burglary defined.—Burglary is the breaking and entering in the night-time the dwelling of another, with the intent to commit a felony therein—52 Cal. 454; 7 Mass. 247; whether the felonious intent be executed or not—7 Mass. 247; 1 Coxe, (N. J.) 441; 37 Mich. 544; 4 Parker Cr. R. 153; 40 Ala. 334. The breaking and entering must be done feloniously—9 W. Va. 456. It is larceny and not burglary for a guest to steal from a bar-room where he had a right to enter—12 N. H. 42. In California, the Code recognizes no such offense as burglary mixed with larceny or another felony—29 Cal. 622; see 1 Tex. Ct. App. 211. That the larceny is merged in the burglary—see 20 Pick. 360; 35 Tex. 91; 31 id. 587; 42 id. 503. The attempt at burglary is indictable at common law—13 Cox C. C. 155; 9 id. 98; Leigh & C. 129; and breaking into the yard of a dwelling-house with intent to commit burglary is an attempt—6 Phila. 305.

The breaking.—There must be a breaking in, actual or constructive—1 Coxe, (N. J.) 439; 82 Pa. St. 306; 25 Gratt. 908. There must be a breaking, removing, or putting aside some part of the dwelling-house relied on as security against intrusion—13 Ired. 244; 20 Iowa, 413; 68 Ill. 271; 105 Mass. 588; but see 3 Parker Cr. R. 552; 1 Hill, 238; 1 Strange, 481; Hill & D. 63. A door or window must be shut, but it need not be locked, bolted, or nailed, a latch to the door and the weight of the window being sufficient—same cases; but it must be shown that they were shut—1 Coxe, (N. J.) 439; 3 Parker Cr. R. 552; 20 Iowa, 413; 13 Ired. 244. Very slight force will suffice to constitute a breaking, as lifting a latch—1 Hale P. C. 552; and if the door be closed, it is not necessary that it be latched—13 Ired. 244; 20 Iowa, 413; 3 Parker Cr. R. 552; raising or pulling down a window-sash—39 Miss. 705; 5 Tex. Ct. App. 74; 7 Car. & P. 441; 1 Russ. & R. 450; although kept down only by its own weight and not fastened, and although there is an outer shutter not closed—Russ. & R. 450; 1 Moody C. C. 377; 3 Parker Cr. R. 552; 20 Iowa, 413; 27 Mich. 151; 13 Ired. 244; 39 Miss. 705; entering a chimney or other unusual place—36 Ala. 281; 42 Tex. 278; 7 Jones, (N. C.) 90; 82 Ala. 376; S. C. 1 Am. Cr. R. 362; 8 Pick. 354; 1 Coxe, (N. J.) 439; 7 Dane's Abr. 136;

Russ. & R. C. C. 450; 2 Car. & P. 623; or pushing open a transom—27 Mich. 151; 19 Alb. L. J. 496; or loosening any fastening which the owner has provided—see 4 Bl. Com. 226; 2 East P. C. 437; or removing a covering, if there be no partial opening—105 Mass. 588; 1 Moody C. C. 178; 7 Car. & P. 441; as a screen or netting over a window—8 Pick. 354; see 22 Mich. 229; 7 Gratt. 641; or raising a grating and entering—22 Mich. 229; or lifting the flap of a cellar door held down by its own weight—Ryan & M. 377; 2 East P. C. 487; *contra*, 4 Car. & P. 231; doubted—Russ. & R. C. C. 157; or pushing open a hinged window fastened by a wedge—Russ. & R. C. C. 355; or by breaking or removing a window-pane and inserting hand or finger—Russ. & R. C. C. 499; 1 Car. & P. 300; 9 Id. 44; or by breaking more fully one already broken—9 Id. 44; 1 Ryan & M. 327; or by taking out the glass from a door—Russ. & R. C. C. 417; or by breaking a glass window without removing the inside shutter—Id. 499; 1 Car. & P. 300; or by making an opening by means of fire—49 Ala. 344; 2 Ad. & E. 827; 7 Car. & P. 432; 8 Id. 747.

Constructive breaking.—Constructive breaking may be committed by the use of threats, or by artifice and fraud—43 Ala. 17; 18 Ind. 386; 2 Tex. Ct. App. 412; Phill. (N. C.) 186; 63 N. C. 207; 1 Leach, 406; as by artifice and fraud procuring the door to be opened, by ringing the door-bell—85 Pa. St. 54; or knocking at the door, and when opened, rushing in—4 Bl. Com. 226; or gaining admission on pretense of business—Kelly, 42; or under color of legal process—1 Leach, 234; or deluding a boy to let her in, and sending him on a message, robbing the house—1 East P. C. 435; or with intent to commit a felony, gaining admission by some trick—63 N. C. 207; 19 Ohio St. 308; 82 Pa. St. 306; 85 Id. 54; Phill. (N. C.) 186; but such entry must be immediate, or so soon that the owner could not refasten the door—9 Ired. 463. So, where the owner opens the door to repel the intruder, and an entry is made—2 East P. C. 436; 1 Russ. Cr. 792; or where a lodger robs others of the house while they are at prayers—Kelly, 62; or if entrance is obtained by conspiracy—2 Russ. Cr. 10; as where a servant conspires with a thief to let him in—2 Strange, 81; Hut. 20; Kelly, 67; but if he admit him for the purpose of detection, it is not burglary—43 Cal. 277; 40 Ala. 334; Car. & M. 218; 2 Leach, 913. Where two combine to commit a burglary, and one only enters, both are guilty—2 Parker Cr. R. 11. So, if one entices the owner away, and the other enters—12 Ohio St. 146. A conspiracy to commit a burglary is a felony—2 Tex. Ct. App. 192.

Breaking out.—Breaking out of a house is not burglary at common law—55 Ala. 123; 82 Pa. St. 306; S. C. 5 Week. Notes, 49; 70 N. C. 239; 2 East P. C. 490; 6 Cox C. C. 369; *contra*, 43 Conn. 489. But entering in the night-time, and breaking out to escape, is burglary—43 Conn. 489; but see 82 Pa. St. 306; 70 N. C. 239; as by lifting the latch of a door—8 Car. & P. 748; see Rose. Cr. Ev. 373; or having entered by the chimney, breaking the inside fastening of a window—52 Ala. 376; 36 Id. 281; 3 Green. Ev. § 76; or breaking out of an inner door—8 Cox C. C. 348; 8 Car. & P. 747; 2 East P. C. 488; 1 Hale P. C. 524; or getting the head through a skylight—Jebb C. C. 99. But entering in the day-time through an open window, or an open door, and escaping by breaking out a window, is not burglary—6 Parker Cr. R. 638; 82 Pa. St. 306; 22 Am. R. 758; 55 Ala. 123; *contra*, 43 Conn. 489; 21 Am. R. 665; but it is made so by statute—70 N. C. 239; 16 Am. R. 769.

Constructive entry.—Sending in a child of tender years to bring out goods is a constructive entry—1 Hale P. C. 555. Every entrance, except by the consent of the owner or his agent, is a burglarious entry—1 Tex. Ct. App. 625; and a consent of detectives is the consent of their employers—53 Cal. 185; 3 Tex. Ct. App. 156. When some stand outside while others enter, all are equally guilty—3 Inst. 63; 2 East P. C. 456; 1 Hale P. C. 459.

The entering.—An entering is necessary, but the least entry is sufficient—5 Tex. Ct. App. 74; Russ. & R. C. C. 499; Id. 341; 1 Moody C. C.

184; 2 East P. C. 487. It is not necessary that the whole body enter—4 Ala. 643. A hand inserted to unlatch a window—43 Ala. 717; Fost. 107; Anders. 115; 1 Car. & P. 300; 2 East P. C. 487; Russ. & R. C. C. 341; 4 Car. & P. 747; 9 id. 44; id. 432; 4 Cox C. C. 398; 2 East P. C. 490; S. C. Fost. 107; but merely breaking out a shutter, and not getting through the pane of glass is not sufficient—4 Ala. 643. Thrusting an arm through a broken pane is an entry—1 Moody C. C. 377; or an arm or hand through an opening to enlarge it—111 Mass. 395; or inserting a finger, 42 Tex. 276; Russ. & R. C. C. 449; or a foot—see Barb. C. L. 98; raising a window and holding it up with the fingers—42 Tex. 276; Russ. & R. C. C. 433; or introducing the hand between an outer window and an inner shutter—Russ. & R. C. C. 341; 1 Car. & P. 300; otherwise if the shutters are outside—4 Ala. 643; breaking in a window and putting in a hook or stick; or putting in a pistol or gun—1 Hale P. C. 551; 2 East P. C. 490; see 1 Stark. 43. Shooting through a window to commit a felony is an entry—3 Chit. C. L. 1103; but where a hole was too small to admit the hand or instrument, it is not sufficient—1 Leach, 406; so inserting a crowbar under the bottom of the inside shutter, the hand not inside, is not an entry—1 Moody C. C. 184; 2 East P. C. 487.

The intent.—An intent to commit a felony is a material element of the crime—16 Cal. 431; 46 Ga. 322; 12 Nev. 337; see 5 Bush, 376; 3 Har. (Del.) 554; 48 Ala. 684; 2 Tex. Ct. App. 110; 7 id. 276; id. 582; and must be proved—11 N. H. 269; 23 id. 301; 16 Vt. 551; 2 Parker Cr. R. 583; 64 N. Y. 583; 3 Har. (Del.) 554; Winst. (N. C.) 197; id. 248; 12 Nev. 337. The intent must be felonious—12 Serg. & R. 177; 14 Ill. 497; as a servant unlatching his master's door with intent to kill him—4 Cranch C. C. 604; 2 East P. C. 483; or with intent to commit a rape on his mistress—1 Strange, 481; East P. C. 488. That the execution of the intended felony was frustrated, or that he desisted through fear, is no defense—Winst. (N. C.) 249. Intent is the gist of a burglarious entry to commit rape, and therefore the actual presence of the female is not requisite—5 Tex. Ct. App. 74. See Desty's Crim. Law, § 5.

In Ohio the intent forms no ingredient of the offense when personal violence is attempted—6 Ohio, 22. So also in Vermont, if the intent be to commit adultery, to break and enter is not burglary—16 Vt. 551; or where the intent was only to cut off an ear—7 Mass. 245.

The intent with which defendant entered, is a question of fact for the jury—53 Cal. 415; 54 Ga. 106; S. C. 1 Am. Cr. R. 366; to be inferred from the facts and circumstances—49 Cal. 57; 53 id. 415; 2 Cush. 582; 7 N. Y. 445; 2 Parker Cr. R. 583; 13 Pa. St. 95; 29 Gratt. 796; 42 Tex. 276. As entering through the window, clandestinely, at a late hour at night after the lights were extinguished—53 Cal. 415; or entering a room, seizing a young lady by the ankle, and escaping on her screaming for help—13 Ired. 24.

The same intent must characterize both the breaking and the entering—Russ. & R. 417. Violently breaking into a house with intent to disturb the peace is indictable as malicious mischief—15 Pa. St. 95; 5 Binn. 281. The felonious act need not have been committed if the intent can be inferred—5 Bush. 376; and if the felony be committed the act is *prima facie* evidence of the intent to commit it—11 N. H. 37; 20 Pick. 356; 4 Parker Cr. R. 153; 7 Serg. & R. 491. Every one is presumed to intend the consequence of his own acts—55 Cal. 201.

The crime of burglary by breaking and entering with intent to steal is complete if it is found that defendant broke into and entered for that purpose without reference to the value of the goods—23 Cal. 214; or that there was in fact no goods in the house to steal—23 Cal. 214; 32 id. 38; 2 Tex. Ct. App. 110; 2 id. 517. Where one agreed to enter, mark the money and hand it to the burglar who stood outside, to entrap the burglar, such an entry is no burglary, as he had entered with no felonious intent—53 Cal. 185.

The dwelling-house.—A house, in the sense of the statute, is any structure which has walls on all sides, and is covered by a roof—34 Cal.

245; regardless whether it was or ever had been inhabited by members of the human family—*Id.*; see 71 N. Y. 561; enlarging the common-law definition, which required it to be a dwelling-house where the family usually resided—see 60 Pa. St. 103. House, dwelling, mansion-house, and residence are equivalent terms—3 Serg. & R. 199; 3 Parker Cr. R. 208; 20 Wis. 599. The possession of a renter is sufficient—49 Iowa, 51. Burglary may be committed by breaking into a lodging-room, even by a person lawfully within the building of which it is a part—14 Gray, 163; 26 N. Y. 200; 3 Parker Cr. R. 552; 42 Vt. 629; 8 Car. & P. 747; and the apartment must be said to be his dwelling-house—38 Cal. 138; 38 Ga. 165; 26 N. Y. 200; 1 Parker Cr. R. 329; 3 *Id.* 552; 8 Car. & P. 747; 1 Moody C. C. 23; 1 Leach, 237; *Id.* 537; Salk. 532; so of a loft over a stable, used as a lodging—1 Leach, 305; or a garret used as a workshop, with an apartment for sleeping—*Id.* 237. The occupation of the servant as such is the occupation of the master—1 Hayw. (Tenn.) 242; 3 Humph. 379; Russ. & R. C. C. 442; 7 Car. & P. 150; Russ. & R. C. C. 115; unless he occupied it as a lessor—1 Moody C. C. 7; see 5 Car. & P. 202; Russ. & R. C. C. 525; 1 Moody C. C. 42; *Id.* 248; 1 Leach, 305; Russ. & R. C. C. 187. A house tenanted by a married woman is the house of the husband—5 Car. & P. 202; Russ. & R. C. C. 491; *Id.* 517. But see 18 Ohio, 308; 26 Mich. 106.

What within the curtilage.—Outhouses, store-rooms, warehouses, barns, etc., are included with the dwelling, if they are within the curtilage, whether the yard be inclosed or open—3 Parker Cr. R. 23; 2 Hun. 336; 8 C. 71 N. Y. 561; 1 Dev. 253; 1 Hayw. (Tenn.) 102; *Id.* 242; 2 East P. C. 493; Russ. & R. 357; *Id.* 334; as a barn, part of the same group of buildings, and not separated by a public road—16 Mich. 142; but otherwise, if separated by a highway—36 *Id.* 309; and see 1 Dev. 233; 1 Nott & McC. 583; or a workshop adjoining the residence—Russ. & R. 334; or a smoke-house opening into the yard of a dwelling-house—4 Jones, (N. C.) 349; but otherwise, if detached and in a distinct lot—1 Winst. (N. C.) No. 2, 80; so, of a goose-house opening into the yard—Russ. & R. 660. A two-story house, partly occupied as a storehouse, and partly for sleeping accommodations, is a dwelling-house—26 Ala. 145; and see 68 N. C. 206; but where there was no fence inclosing the dwelling, and the store, which was twenty feet off and not appurtenant and ancillary to the house, is not part of the dwelling—see 4 Johns. 424; 60 Pa. St. 103; 1 Nott & McC. 583. Outhouses, to be within the curtilage, must be ancillary to the main building, contiguous thereto, or within the same inclosure or lot—4 Conn. 446; 20 Ala. 30; and must itself be a complete structure—1 Car. & K. 303.

460. Every burglary committed in the night-time is burglary of the first degree, and every burglary committed in the day-time is burglary of the second degree. [Approved Feb. 9th, in effect May 1st, 1876.]

461. Burglary of the first degree is punishable by imprisonment in the State prison for not less than one nor more than fifteen years. Burglary of the second degree is punishable by imprisonment in the State prison for not more than five years. [Approved Feb. 9th, in effect May 1st, 1876.]

House-breaking.—Burglary committed in the night-time is burglary in the first degree, and burglary committed in the day-time is in the second degree—52 Cal. 454. They are distinct offenses—52 Cal. 454.

The mere fact that one person is with another who enters a house and steals therefrom, but who does not interfere to prevent the theft, does not render him guilty—27 Cal. 490. The offense is complete if the value of the property intended to be stolen was less than fifty dollars—28 Cal. 218, distinguishing 8 id. 519. Entering, by opening a door fastened by a latch, is the offense, if the intent to commit a felony exists—1 Lea, (Tenn.) 444; 3 Greenl. Ev. § 576.

Terms defined.—A "shop" includes any place where goods are sold or work is done for which money is received—5 Day, 131. See 4 Conn. 446; 1 Root, 63; 19 N. H. 135; but not a counting-room—4 Parker Cr. R. 153; nor place of business—48 Ga. 505. The term "shop" is equivalent to store—14 Gray, 376; and breaking and entering into a shop adjoining a dwelling-house is indictable—3 Met. 316; id. 588; 1 Mass. 248; but see 20 Pick. 356. That the terms "shop" and "store" are not synonymous, see—19 N. H. 135. A "store" is a place where goods are exhibited for sale—19 N. H. 135; and breaking into and entering a store is indictable under the statute—10 Mass. 153; but see 8 Mass. 490. A "storehouse" includes a place of storage for all purposes, including commercial use—3 Ired. 570. A "warehouse" is any place used for the temporary storage of merchandise—24 Conn. 57; 10 Ohio St. 287. See 3 Serg. & R. 199; and includes a cellar—M. & R. 458; and a railroad depot—51 Vt. 287. A passenger-room in a railroad station is an office under the statute—6 Cush. 181.

462. Section four hundred and sixty-two of the Penal Code is repealed. [Approved Feb. 9th, in effect May 1st, 1876.]

463. The phrase "night-time," as used in this chapter, means the period between sunset and sunrise.

The time.—The offense of burglary in the first degree must be committed in the night-time—5 How. (Miss.) 20; but not at any particular hour of the night—35 Cal. 115. If the breaking and entering be in the night-time, it is burglary in the first degree, and if in the day-time it is in the second degree—52 Cal. 453. Night-time consists of the period from the termination of daylight to the earliest dawn of the morning—10 N. H. 105; and the presence of sufficient daylight to discern a man's features is an established criterion—19 Cal. 578; 16 Conn. 32; 10 N. H. 105; 5 How. (Miss.) 20; 7 Dane's Abr. 134. Whether committed in the night or day-time is a question of fact for the jury—5 How. (Miss.) 20; 35 Conn. 515; see 35 Cal. 115; 31 Ohio St. 462; to be inferred from facts and circumstances—10 N. H. 105; 58 Ga. 78; and no presumption of law will suffice—53 id. 567; 4 Jones, (N. C.) 349; see 42 N. Y. l. Between six and seven o'clock, on the afternoon of August 31st, is not in the night-time—19 Cal. 578. It is not material that the breaking and entering were done on different nights—Russ. & R. C. C. 417; 7 Car. & P. 432; 9 id. 44; so, a party present at the breaking on the first night is a principal, though absent at the entering—7 id. 432. It is immaterial that part of the work was done in the day-time—111 Mass. 395. See 25 Me. 500; Charlt. R. M. 80; 2 Tex. Ct. App. 412.

CHAPTER III.

HAVING POSSESSION OF BURGLARIOUS INSTRUMENTS AND
DEADLY WEAPONS.

§ 466. Possession of burglarious instruments.

§ 467. Having possession of deadly weapons.

466. Every person having upon him, or in his possession, a picklock, crow, key, bit, or other instrument or tool, with intent feloniously to break or enter into any building, or who shall knowingly make or alter, or shall attempt to make or alter, any key or other instrument above named, so that the same will fit or open the lock of a building, without being requested so to do by some person having the right to open the same, or who shall make, alter, or repair any instrument or thing, knowing, or having reason to believe, that it is intended to be used in committing a misdemeanor or felony, is guilty of misdemeanor. Any of the structures mentioned in section four hundred and fifty-nine of this Code, shall be deemed to be a building within the meaning of this section. [In effect March 3rd, 1874.]

To procure, with a criminal intent, is an offense—Russ. & R. C. C. 308; 1 El. & B. 435; and possession may be shown on a charge of procuring—Russ. & R. C. C. 308; 1 Lew. C. C. 42.

467. Every person having upon him any deadly weapon with intent to assault another, is guilty of a misdemeanor.

CHAPTER IV.

FORGERY AND COUNTERFEITING.

- § 470. Forgery of wills, conveyances, etc.
- § 471. Making false entries in records or returns.
- § 472. Forgery of public and corporate seals.
- § 473. Punishment of forgery.
- § 474. Forging telegraphic messages.
- § 475. Passing or receiving forged notes.
- § 476. Making, passing, or uttering fictitious bills, etc.
- § 477. Counterfeiting coin, bullion, etc.
- § 478. Punishment of counterfeiting.
- § 479. Possessing or receiving counterfeit coin, bullion, etc.
- § 480. Making or possessing counterfeit dies or plates.
- § 481. Counterfeiting railroad ticket, etc.
- § 482. Restoring canceled tickets.

470. Every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any charter, letters, patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, bank-bill or note, post-note, check, draft, bill of exchange, contract, promissory note, due-bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or assurance of money, certificates of shares of stock, goods, chattels, or other property whatever or any letter of attorney, or other

power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, draft, order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court, or the return of any officer to any process of any court, is guilty of forgery.

Forgery defined.—Forgery is the fraudulent making or alteration of a writing, to the prejudice of another's rights—35 Cal. 507; 4 Up. Can. Pr. 216; 1 Dears. & B. 566; Law R. 1 C. C. 200; 2 Leach, 775. It is the false making, or materially altering, with intent to defraud, any writing which, if genuine, might apparently be of legal efficiency, or the foundation of a legal liability—53 Ala. 467; 5 Ark. 349; 8 Iowa, 231; 19 id. 299; 26 id. 407; 20 id. 541; 3 Cush. 150; 2 Bay, 262; 2 Me. 365; 50 id. 409, 411; Thach. C. C. 187; 2 Const. S. C. 669; 4 Parker Cr. R. 217; 6 id. 135; 8 Yerg. 151; 15 Mass. 526; Addis. 33; 1 James, 385. It is the making of an instrument fraudulently purporting to be that which it is not—10 Low. Can. Jur. 236; Law R. 1 C. C. 200; doubted—11 Gray, 197; or a fraudulent application of a false signature to a true instrument—1 Hale P. C. 683. Even a mark made in the name of another is forgery—1 Leach, 57. Writing includes everything done by the pen, by engraving, or by printing—3 Gray, 441; 8 Cox C. C. 32; or otherwise—36 Ill. 239; as, by pasting a name over another's—1 Har. (Del.) 507; or, engraving—4 Parker Cr. R. 166; 7 Cox C. C. 494; Dears. & B. 460; 1 Moody C. C. 307; id. 304; or by photographic process—Leigh & C. 330. The bare making, without publishing or uttering, constitutes the offense—2 Bay, 262; 2 Mass. 397; Russ. & R. C. C. 97. The common-law offense is not superseded by the statute—3 Cush. 150. The purpose of the statute is protection of society—35 Cal. 503.

Subjects of forgery.—The following instruments have been held subjects of forgery: An acquittance for a specific sum—2 Cranch C. C. 521; 1 Sid. 278; or a receipt in full—2 Allen, 161; 15 Ohio, 717; 2 Leach, 732. A receipt may be an acquittance—15 Mass. 526; 51 Vt. 102; 7 Car. & P. 549; 8 id. 180; 1 Car. & M. 133; and an agreement of sale of standing timber may be a receipt—14 Up. Can. C. P. 309. So, book entries are subjects of forgery when legal evidence against vendee—32 Pa. St. 529; 49 How. Pr. 462; but see 46 N. H. 286; or entries in a pass-book—9 Cox

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C. C. 162; 1d. 166; 1 Leach, 180. So, to alter accounts after joint settlement is forgery—15 Ohio, 717. Certificates of good character are subjects of forgery—Thach, C. C. 187; 10 Mass. 209; 2 Post. & F. 44; 4 Cox C. C. 38; 6 id. 312; 7 id. 503; Dears. & B. 285; 4 Up. Can. L. J. 240. So, of letters of attorney—28 Mich. 255; S. C. 2 Green C. R. 572. So a letter of recommendation may be a subject of forgery—2 Cranch C. C. 521; 56 Ga. 171; 1 Salk. 406; or a letter of credit—2 Cranch C. C. 521; Styles, 12; but a mere letter of introduction is not within the rule—67 Ill. 91. County warrants are subjects of forgery—18 Mo. 445; so, of bonds—Addis. 44; 2 Va. Cas. 205; so, of deeds for land—Law R. 1 C. C. 290; 20 Up. Can. C. P. 159; though lying in another State—18 Johns. 163; or a certificate of acknowledgment—63 Ind. 567. A forged transfer of land, though a blank be left for the name of the transferee, is an instrument within the statute—6 Tex. Ct. App. 364. Federal securities are subjects of forgery cognizable in State courts—87 Pa. St. 87; 4 Dall. App. 26; see 4 Minn. 418; so, of telegraphic messages—25 Up. Can. C. P. 440; so, of railroad and other tickets—3 Gray, 441; 9 Cox C. C. 160; 2 Car. & K. 604; as lottery tickets—3 Gray, 441.

Writings subject of forgery.—The instrument need not be in writing nor in words—2 Har. (Del.) 288; 14 Me. 30; 9 Cox C. C. 391; 6 id. 533. All writings affecting another's rights, whether under seal or not, are subjects of forgery—see 7 Baxt. (Tenn.) 76; 53 Ala. 463. But if the instrument be void on its face, or merely frivolous, it is not subject of forgery—26 Up. Can. Q. B. 202; unless the forgery be one of a series of acts done to defraud—35 Cal. 503; 120 Mass. 358; 12 Serg. & R. 237; 37 Tex. 531; so, if it be void by statute—1 Leach, 431; Russ. & R. C. C. 65; so, if it be a *nudum pactum*—35 Cal. 503. It must be an instrument on which suit could be brought—2 Me. 365; see 1 Whart. C. L. 8th ed. § 636; and must be calculated to injure another—35 Cal. 503; 7 Baxt. (Tenn.) 76; or that injury may probably or possibly be done—53 Ala. 469; 60 id. 161; 4 Wash. C. C. 726; Bald. 374; 3 Cranch C. C. 43; 2 Taunt. 333; 2 Strange, 747; 2 Ld. Raym. 1461; 2 Strange, 501; 1 Ld. Raym. 707; and its capacity to injure may be imparted to it by extrinsic facts—53 Ala. 467; 34 Vt. 503; 11 Ohio St. 410; 3 Gray, 448; 19 Minn. 58; S. C. 1 Green C. R. 541; 9 Cowen, 773; 8 Barb. 560; 28 Ind. 396; 101 Mass. 211; 21 Wend. 413.

Commercial paper of all kinds is subject of forgery—2 Mass. 397; 118 id. 439; 1d. 460; 2 Me. 365; 12 Serg. & R. 237; 2 Moody & R. 117; 2 East P. C. 955. But a bill of exchange void by statute—53 Ala. 469; 1 Bay, 205; or a bill without a signature, is not subject of forgery—Russ. & R. 455. Checks and drafts are subjects of forgery—11 Wis. 267; S. C. 2 Am. Cr. R. 149; 3 Ill. 442; or negotiable certificates—118 Mass. 439; 3 Ohio St. 229; Addis. 44. A promissory note is subject of forgery—5 Johns. 263; and the engraved border is a part of the note—1 Up. Can. L. J. 136; but not a memorandum in pencil on the margin—66 Ind. 331. An indorsement is subject of forgery—28 Cal. 507; 2 Cranch C. C. 521; and signing the name of any person upon a bill of exchange other than the maker or acceptor, is forgery of the indorsement—6 Pac. Coast Law J. 610. See 6 Cowp. 73; 2 East P. C. 958; 1 Leach, 438; Russ. & R. C. C. 260. The essential elements of forgery of a note are falsity of the instrument, and intent to pass it as the true note of another—114 Mass. 311; 120 Mass. 358.

Orders for money.—An order is subject of forgery—2 Cranch C. C. 294; 9 Barb. 664; 3 Cush. 150; as an order for money—8 Ohio, 196; 14 Johns. 347; see 59 Ala. 784; 80 N. C. 472; 2 Moody C. C. 210; 13 Up. Can. C. P. 619; 17 Up. Can. Q. B. 296; though no consideration is expressed—10 Humph. 442; but a request for a loan is not an order—20 Up. Can. Q. B. 260. An order giving a trade credit, or a request to loan another money, is subject of forgery—2 Cranch C. C. 521; 2 Ld. Raym. 1461; explained—5 Mod. 137; 1 Salk. 342. An order, though coupled with a promise, is subject of forgery—61 Ala. 33. Checks and orders from a

branch bank are subjects of forgery—8 Leigh, 707. The criterion of an instrument being an order is whether the drawee could recover the amount on payment—17 Up. Can. Q. B. 296. It is not necessary that the drawer should have the right to draw—2 Cranch C. C. 1; 1 Brev. 35; but see 65 N. C. 419; nor that the drawee should be bound to obey—114 Mass. 278. See 1 Brev. 35.

Orders for goods.—An order for the delivery of goods is subject of forgery—2 Cranch C. C. 294; id. 1; 11 Ga. 92; 1 Cold. 167; overruling 6 Yerg. 37; but see 65 N. C. 419; 30 La. An. pt. 2, 1162; 2 Lea, (Tenn.) 513; 14 Johns. 347; 18 Up. Can. Q. B. 416. But a pecuniary demand is not an order for goods—53 Ala. 488. See 14 Allen, 560; 24 Ala. 489; 29 id. 684. So, a request to deliver goods is subject of forgery—9 Barb. 664; although not addressed to any one—2 Lea, (Tenn.) 514; 25 N. Y. 380; 5 Parker Cr. R. 291; and it is not necessary that the drawer have the right to make the order—17 Mass. 46; 11 Ga. 92; or that the drawee be bound to obey—89 N. C. 403; 65 id. 419; 9 Ired. 454; Phill. (N. C.) 535; 66 N. C. 644. To sign under an assumed name to defraud drawee, is forgery—Russ. & R. C. C. 209.

Bank-notes.—Notes of a bank may be forged even if there be no such bank, or the bank be erroneously described—12 Up. Can. Q. B. 543; 40 id. 219; or if it be of a denomination never yet issued—30 Mo. 236; 2 Head, 591; or if they be of a prohibited denomination—2 Har. (N. J.) 327; 12 Serg. & R. 237; 4 Pa. St. 210; 9 id. 211; 9 Ohio St. 354; see 5 Leigh, 707; 5 Ark. 349; or of an expired bank—12 Serg. & R. 237. The mere prohibition of the circulation of bank-bills does not prevent them from being subjects of forgery—9 Ohio St. 354; unless their circulation be made a crime—21 Ill. 642.

What not subjects of forgery.—A writing which is a mere attempt to receive courtesies, on a promise of no binding obligation, is not a subject of forgery—67 Ill. 91; or a writing which states that certain persons are solvent—5 Ala. 747; or a bill of lading—2 Cranch C. C. 521; 1 Sid. 278; 5 Mod. 137; or a clearance card from a social lodge—Law R. 1 C. C. 217.

Alterations.—It is forgery fraudulently to alter the sum on a note—4 N. H. 455; 15 Ohio St. 455; 20 Iowa, 541; 7 Car. & P. 669; Russ. & R. C. C. 101; id. 33; 2 East P. C. 979, 986; or to alter the date of a note or order—3 Yeates, 391; 19 Pa. St. 119; 6 Parker Cr. R. 135; 35 Mo. 105; 4 Term. Rep. 320; 6 East, 309; 15 id. 29; 7 Car. & P. 669; or to alter a check already made, with intent to defraud—47 Cal. 401; as, altered, it is forgery of the whole—13 Ired. 491; to alter book accounts and pass-books—9 Cox C. C. 162; Leigh & C. 168; 1 Leach, 180; to alter the receipt on a note, though such receipt was without signature—10 Ohio, 75. So, it is forgery for a person fraudulently to alter an instrument previously forged by himself—2 East P. C. 856; or to erase one signature or indorsement and insert another—2 Har. (Del.) 527; 15 Mass. 326; 3 Brev. 507; 16 N. J. L. 507; Russ. & R. C. C. 251. To change the vignettes or marginal emblems of a bank-note—6 Cox C. C. 533; doubted—3 Brev. 507.

Insertions.—To insert after a name a false address is forgery—1 Denison, 296; or, to insert a solvent banker's name for one who is insolvent—16 N. J. L. 507; 2 Taunt. 323; or to add words to a receipt, offered to supply a lost original—5 Strob. 53; 5 Esp. 100; or, inserting in a check the words "cash" or "bearer" instead of "order of"—47 Mo. 562; but the mere addition of surplusage to an instrument is not forgery—7 Ired. 206; 1 N. H. 97; 6 Mass. 519; 2 Leach, 1040. Forgery, by addition to the instrument, must be specially alleged and proved as laid—Russ. & R. C. C. 251.

Erasures and mutilation.—The erasure or mutilation of an instrument may be forgery, as to erase the name of a city from a bank-bill, and put the name of another in its place—1 Har. (Del.) 507; as erasing

or obliterating a receipt from a bond—6 Ired. 79; or an indorsement from a note—1 Aiken, 311; but see 6 Ired. 79; 1 Ark. 311.

Filling up instrument.—To fill up fraudulently bank-checks or acceptances is forgery—38 N. H. 324; 47 Mo. 552; 1 Moody C. C. 486; 7 Car. & P. 632; 2 Car. & K. 527; 2 Cox C. C. 426; 1 Lew. C. C. 135; or to fill up a signed check without authority—2 Car. & K. 703; or to fill up a blank with a larger sum than was authorized—32 Pa. St. 529; 7 Car. & P. 632; or for an agent fraudulently to alter the provisions in an instrument in cases of wills and deeds signed in blank—70 Ill. 46; 47 Iowa, 454; Noy, 101.

Use of fictitious name.—Forgery may be committed by the use of a fictitious name—120 Mass. 358; 5 Ala. 747; Bald. 368; 1 Cranch C. C. 218; 1 Leach, 94; id. 97; id. 172; id. 214; Russ. & R. C. C. 75; 8 Car. & P. 629; as drawing or accepting in a fictitious name—17 Ga. 459, where the instrument is used to prejudice a responsible person bearing the same name—Russ. & R. C. C. 405; 4 Fost. & F. 81; 4 Term Rep. 28; so, of the fraudulent use of the name of a fictitious firm—8 Car. & P. 629; 2 Fost. & F. 560; but it is not forgery if defendant purports to be a member of such firm—11 Gray, 197; and see Russ. & R. C. C. 260; 1 Leach, 438. To sign the name of a non-existent person, if likely to defraud, may be forgery—7 Peters, 132; Bald. 368; 6 Serg. & R. 568; 119 Mass. 214; 13 Ohio, 453; 14 Tex. 503; 9 Cox C. C. 162; id. 166; 1 Leach, 94; id. 226; 2 id. 775; id. 983; Russ. & R. C. C. 389; id. 209; but see 5 Ala. 747; 11 Gray, 157; or the name of a non-existent corporation, to defraud—Bald. 368; 4 Blinn. 418; 8 Leigh, 732; as a non-existent bank—Bald. 368; 6 Serg. & R. 569. To forge the name of an imaginary child as the representative of a childless person is indictable—2 East P. C. 957. So, to sign a paper in an assumed name, to defraud, if the paper purports to be genuine, is forgery—Bald. 368; Russ. & R. C. C. 255; id. 297; id. 209; id. 260; id. 278; id. 292; 1 Leach, 57.

Intent.—The essence of the offense is the intent to defraud—3 Cranch C. C. 43; 39 N. J. L. 365; 51 Vt. 105; 2 Humph. 347; 15 Mass. 526; 21 Wend. 409; 7 Car. & P. 549; 15 Up. Can. Q. B. 119; 2 Taunt. 334. Fraud and intent to deceive constitute the chief ingredients—4 Wash. C. C. 728; and it is not necessary that any particular person should be in fact defrauded—8 Iowa, 231; 15 Mass. 526; 2 Humph. 347; 1 Bay, 120; Addis. 44; Thach. C. C. 132; 14 Tex. 503; 5 Ohio, 12; 2 Strange, 901; 1 Ld. Raym. 737; 8 Low. Can. J. 285; 14 Up. Can. C. P. 309; *contra*, 25 Mich. 358; nor is it necessary that any one should be in a state to be defrauded—8 Iowa, 231; 14 Tex. 503; 2 Denison, 493; Russ. & R. C. C. 154; 2 Car. & K. 356. The intent may be inferred from facts and circumstances—Bald. 374; 51 Ind. 405; 75 Ill. 638; 2 Humph. 494; 13 Ohio, 198; 8 Car. & P. 274; id. 276; id. 434; id. 582; 9 id. 499. It is sufficiently shown by exhibiting a forged receipt for money pretended to have been paid out on an employer's account—7 Car. & P. 549. The intent exists though the forger himself intends to protect and take up the instrument at maturity—118 Mass. 460; 2 Humph. 494; 7 Car. & P. 224; 8 id. 143; id. 274; 9 id. 499; or though he agrees when uttering it to take it back, if not genuine—2 Humph. 494; 40 Up. Can. Q. B. 214; or though the party intended no harm, or that his claim was just, it is no defense—2 Humph. 494; 50 Me. 409; 19 Wis. 129; 7 Car. & P. 224; 8 id. 582; 9 id. 499; 1 Car. & K. 527.

Validity of forged instrument.—It is not necessary that it would be effective if true and genuine—40 Up. Can. Q. B. 218; nor that it would be valid—7 Peters, 136; 1 Sid. 142; nor that it would be binding on the parties—50 Me. 409; 4 Parker Cr. R. 217. It must appear on its face to possess some legal validity—8 Yerg. 150; 8 Barb. 560; 9 Cowen, 778; 3 Allen, (N. B.) 15; *contra*, Bald. 366. A variance in the name of the drawer is immaterial—80 N. C. 407; or the want of an indorsement—Bald. 373; 1 Brev. 35; or that it wants some requisite of law to give it validity—Bald. 366; id. 373; 2 Leach, 883; id. 707; id. 958; as the want

of a revenue stamp—28 Cal. 507; 32 Tex. 79; 47 N. H. 402; 16 Minn. 472; but see 23 Wis. 504. If it be capable of being *prima facie* proof in an action it is sufficient—Russ. & R. C. C. 33.

Similitude.—Forgery consists in giving the appearance of truth to a mere deceit—Law R. 1 C. C. 200. The resemblance of the forged to the genuine must be such as might deceive a person of ordinary caution—11 Cush. 481; 10 Ind. 372; 7 Pick. 137; 4 Wash. C. C. 733; Russ. & R. C. C. 212; or a person of ordinary observation—5 N. H. 367; 7 Pick. 137; 42 Me. 392; 2 Head, 505; 7 Peters, 132; 2 Har. (Del.) 327. It need not so resemble the genuine as to be likely to deceive experts, or officers of the bank on which the instrument is drawn—11 Cush. 481; see 2 Dill. 392; 2 East P. C. 950; if it be *prima facie* fitted to pass as true, it is sufficient—5 N. H. 367; 7 Pick. 137; 42 Me. 392; 4 Wash. C. C. 733; 2 Head, 505; 25 Wend. 472; 8 Leigh, 732; and see 8 Iowa, 231; 26 id. 407; nor does it matter that detection would have followed a close inspection—1 Har. (Del.) 507. If there is a bare possibility to deceive, it is sufficient—19 La. An. 395. The similitude may exist even though notes of that denomination never had been issued—7 Pick. 137; 5 N. H. 367; 30 Mo. 236.

471. Every person who, with intent to defraud another, makes, forges, or alters any entry in any book of records, or any instrument purporting to be any record or return specified in the preceding section, is guilty of forgery.

Public records and documents.—Judicial and political records are subjects of forgery, as a writ—2 Mass. 136; 6 Hill, 490; 5 Car. & P. 160; or a bail bond—2 Va. Cas. 476; or a warrant of attorney—2 Cranch C. C. 521; Raym. T. 81; or an order for discharge of a prisoner—2 East P. C. 862; Ryan & M. 393; or a deposition—30 Me. 409; or a marriage register—2 Cranch C. C. 521; 2 Sid. 71; or a protection—2 Cranch C. C. 521; 1 Sid. 142; or a will, though it purports to be that of a living person—Bald. 368; 6 Serg. & R. 570; 1 Leach, 99. But a document which does not on its face purport to be a copy of the record, is not a forgery—36 Ill. 239; or a will attested by an insufficient number of witnesses—8 Yerg. 150. A custom-house oath is included in the term "other writings" under the United States Statute—11 Blatchf. 211. Putting a forged mortgage on record is a sufficient uttering—27 Mich. 386; 8 O. 2 Green C. R. 567.

472. Every person who, with intent to defraud another, forges or counterfeits the seal of this State, the seal of any public officer authorized by law, the seal of any court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this State, or of any other State, government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal, or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery.

473. Forgery is punishable by imprisonment in the State prison for not less than one nor more than fourteen years.

474. Every person who knowingly and willfully sends by telegraph to any person a false or forged message, purporting to be from such telegraph office, or from any other person, or who willfully delivers or causes to be delivered to any person any such message falsely purporting to have been received by telegraph, or who furnishes, or conspires to furnish, or causes to be furnished to any agent, operator, or employé, to be sent by telegraph, or to be delivered, any such message, knowing the same to be false or forged, with the intent to deceive, injure, or defraud another, is punishable by imprisonment in the State prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment

Telegraphic messages—25 Up. Can. C. P. 440.

475. Every person who has in his possession, or receives from another person, any forged promissory note or bank-bill, or bills for the payment of money or property, with the intention to pass the same, or to permit, cause, or procure the same to be uttered or passed, with the intention to defraud any person, knowing the same to be forged or counterfeited, or has or keeps in his possession any blank or unfinished note or bank-bill made in the form or similitude of any promissory note or bill for payment of money or property, made to be issued by any incorporated bank or banking company, with intention to fill up and complete such blank and unfinished note or bill, or to permit, or cause, or procure the same to be filled up and completed, in order to utter or pass the same, or to permit, or cause, or procure the same to be uttered or passed, to defraud any person, is punishable by imprisonment in the State prison for not less than one nor more than fourteen years.

Possession of forged bills.—To constitute the crime of possession of counterfeit notes, it is not necessary that there be an intent to fill them up, or an attempt to do so—41 Cal. 656; 28 Id. 214. The scienter is material, and must be alleged and proved—8 Mass. 59; 5 Biss. 122; 5 Sneed, 494. The possession of bank-bills, with intent to pass them in another State, is sufficient—2 Mass. 132; 10 Gray, 477. A bank-bill of another State is a promissory note, and possession of an altered note is possession of a forged note—10 Gray, 477; 11 Id. 305; see 2 Allen, 168. Having in possession several bank-notes on different banks, with intent to pass them, constitutes but one offense—7 Conn. 414; 5 Parker Cr. R. 66; see 9 Mass. 59.

476. Every person who makes, passes, utters, or publishes, with intention to defraud any other person, or who, with the like intention, attempts to pass, utter, or publish, or who has in his possession, with like intent to utter, pass, or publish, any fictitious bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of some bank, corporation, copartnership, or individual, when, in fact, there is no such bank, corporation, copartnership, or individual in existence, knowing the bill, note, check, or instrument in writing to be fictitious, is punishable by imprisonment in the State prison for not less than one nor more than fourteen years.

Passing forged paper.—Passing a counterfeit is putting it off in payment or exchange—Bald. 367; 2 Binn. 332; Russ. & R. 25; Id. 446; Id. 212; Id. 249; Id. 363; 2 Leach, 1096. The offense is complete when it passes into possession of another—21 Wend. 509; even though uttered as base coin—1 Abb. U. S. 137; 17 Vt. 151; 25 Mich. 388; 2 Leach, 644; and even if passed at a gambling-table—Thach. C. C. 293; or for the illegal sale of liquors—4 Colo. 126. Delivering a bank-note to an ignorant boy to be passed is a passing—11 Mass. 136. If there is a concert between two or more to pass counterfeits, the act of one is the act of all, and the possession of one the possession of all—Bald. 292; 4 Halst. 26.

Uttering.—Uttering a forged instrument is parting with it, passing it, or offering to pass it, whether the offer be acceded to or not, knowing it to be forged—28 Cal. 208; Bald. 367; 2 Binn. 332; 20 Gratt. 733; Id. 600; 6 Brit. C. C. 84; Russ. & R. C. C. 25; Id. 446; Id. 212; Id. 249; Id. 363; Id. 200; 2 Leach, 1096. There must be an offering *lucris causa*—7 Cox C. C. 122; and see 7 Car. & P. 428; Russ. & R. C. C. 122; Id. 200; 4 Cox C. C. 430; 2 Leach, 736. It includes any delivery for value—28 Cal. 38; 1 Abb. U. S. 137; 17 Vt. 151. There must be an intent to pass it as genuine—Bald. 367; 1 Abb. U. S. 137; 60 Ala. 34; 28 Ga. 367. It must not only be published as true, knowing it to be false, but with intent to injure some one—28 Cal. 205; 56 Ga. 604; 28 Id. 367; 2 Hawks, 449; Thach. C. C. 588; and it is no defense that there was at the time no one to be defrauded—5 Car. & P. 316; 2 Denison, 493. It is an independent offense—8 Mass. 59; Id. 107; and intent to defraud is an essential element—39 N. J. L. 365; Thach. C. C. 132; 2 Taunt. 334; but this may be inferred from the facts—see 1 Brev. 482; 27 Mich. 387; 3 Abb. N. Y. App. 441; 1 Cox C. C. 250; 4 Id. 430; 6 Id. 18; 1 Id. 312; Russ. & R. C. C. 86;

id. 149; 1 Car. & K. 707. Knowledge that the instrument is forged may be proved by other utterings—28 Cal. 513; 4 Wash. C. C. 729; Bald. 292; id. 519; 4 Allen, 305; 10 id. 184; 3 Brev. 552; 42 Ala. 532; 16 Gratt. 530; 2 Hawks, 248; 2 Humph. 78; 45 Ill. 152; 24 Me. 139; 10 Met. 256; 2 Leigh, 751; 5 id. 708; 15 Ohio, 217; 3 Ind. 353; 2 Rich. 418. See Desty's *Crim. Law*, title *FORGERY*.

477. Every person who counterfeits any of the species of gold or silver coin current in this State, or any kind or species of gold-dust, gold or silver bullion, or bars, lumps, pieces, or nuggets, or who sells, passes, or gives in payment such counterfeit coin, dust, bullion, bars, lumps, pieces, or nuggets, or permits, causes, or procures the same to be sold, uttered, or passed, with intention to defraud any person, knowing the same to be counterfeited, is guilty of counterfeiting.

Counterfeiting.—The Congress of the United States has power to punish for counterfeiting—see Desty's *Fed. Const.* art. I, § 8, p. 92; but the power of Congress is not exclusive—5 How. 410; 9 id. 560; 34 Cal. 183; 3 Mo. 421. Counterfeiting applies to the act of *making* as distinguished from the act of *circulating*—10 Law Reporter, 400; and the latter may be punished by the State—5 How. 410; 9 id. 560; 34 Cal. 183; 1 Doug. (Mich.) 207; 3 Head, 26; 2 Tread. 776; 2 Law Reporter, N. S. 92. Counterfeiting smooth-worn coin is sufficient—1 Leach, 285; id. 364. Brightening up base coin for circulation is counterfeiting—2 Va. Cas. 356. A State may punish for counterfeiting a national bank-note—2 Ark. 89; and it is sufficient similitude if it had the external appearance, and purported to be signed by the president and cashier—7 Pick. 137; but where there was no such bank in existence, it was held not an offense under the statute—2 Mass. 138. Forgery may be committed by counterfeiting an instrument wholly printed or engraved—3 Gray, 441; 4 Parker Cr. R. 166; as railroad passes—3 Cush. 150.

478. Counterfeiting is punishable by imprisonment in the State prison for not less than one nor more than fourteen years.

479. Every person who has in his possession, or receives for any other person, any counterfeit gold or silver coin of the species current in this State, or any counterfeit gold dust, gold or silver bullion or bars, lumps, pieces, or nuggets, with the intention to sell, utter, put off, or pass the same, or permits, causes, or procures the same to be sold, uttered, or passed, with intention to defraud any person, knowing the same to be counterfeit, is punishable by imprisonment in the State prison not less than one nor more than fourteen years.

Guilty possession.—The guilty participation in the act may be inferred from proof of possession of a quantity of the coin, and instruments and apparatus for making it—5 McLean, 235; id. 208; possession with knowledge of the purpose for which they were designed—41 Cal. 656. So a State may punish the offense of keeping counterfeit coin with intent to pass it—3 Head, 26; as coin in the similitude of Mexican dollars—10 Met. 256; but California gold coin not being lawful coin, the passing thereof is not within the statute—1 Gray, 564. Evidence that the defendant had counterfeit coin for sale, and that he sold such coin to a party, is sufficient to convict—30 Cal. 717; see 22 Pick. 476; 4 Gray, 29.

480. Every person who makes, or knowingly has in his possession any die, plate, or any apparatus, paper, metal, machine, or other thing whatever, made use of in counterfeiting coin current in this State, or in counterfeiting gold dust, gold or silver bars, bullion, lumps, pieces, or nuggets, or in counterfeiting bank notes or bills, is punishable by imprisonment in the State prison not less than one nor more than fourteen years; and all such dies, plates, apparatus, paper, metal, or machine, intended for the purpose aforesaid, must be destroyed.

Molds and tools.—A state may impose a penalty for keeping molds and tools adapted to counterfeiting—2 Oreg. 221; but not unless there was an intent to use them—34 Cal. 183; 2 Mass. 138; but see Law E. 1 C. C. 284; the possession of an instrument for making one side only of a counterfeit is sufficient—6 Met. 221.

481. Every person who counterfeits, forges, or alters any ticket, check, order, coupon, receipt for fare, or pass, issued by any railroad company, or by any lessee or manager thereof, designed to entitle the holder to ride in the cars of such company, or who utters, publishes, or puts into circulation, any such counterfeit or altered ticket, check, or order, coupon, receipt for fare, or pass, with intent to defraud any such railroad company, or any lessee thereof, or any other person, is punishable by imprisonment in the State prison, or in the county jail, not exceeding one year, or by fine not exceeding one thousand dollars, or by both such imprisonment and fine. [Approved March 30th, in effect July 1st, 1874.]

482. Every person who, for the purpose of restoring to its original appearance and nominal value in whole or in part, removes, conceals, fills up, or obliterates, the

cuts, marks, punch-holes, or other evidence of cancellation, from any ticket, check, order, coupon, receipt for fare, or pass, issued by any railroad company, or any lessee or manager thereof, canceled in whole or in part, with intent to dispose of by sale or gift, or to circulate the same, or with intent to defraud the railroad company, or lessees thereof, or any other person, or who, with like intent to defraud, offers for sale, or in payment of fare on the railroad of the company, such ticket, check, order, coupon, or pass, knowing the same to have been so restored, in whole or in part, is punishable by imprisonment in the county jail, not exceeding six months, or by a fine not exceeding one thousand dollars, or by both such imprisonment and fine. [Approved March 30th, in effect July 1st, 1874.]

CHAPTER V.

LARCENY.

- § 484. "Larceny" defined.
- § 485. Larceny of lost property.
- § 486. Grand and petit larceny.
- § 487. Grand larceny defined.
- § 488. Petit larceny.
- § 489. Punishment of grand larceny.
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- § 491. Dogs property.
- § 492. Larceny of written instruments.
- § 493. Value of passage tickets.
- § 494. Written instruments completed but not delivered.
- § 495. Severing and removing part of the realty.
- § 496. Receiver of stolen property.
- § 497. Larceny, and receiving stolen property out of the State.
- § 498. Stealing gas.
- § 499. Stealing water.
- § 500. Larceny of goods saved from fire in San Francisco.
- § 501. Purchasing or receiving in pledge junk, etc.
- § 502. Applies §§ 339, 342, and 343 to junk dealers.

484. Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another.

See Stat. app'd March 6th, 1872, and Stat. app'd March 20th, 1872, Appendix, pp. 714, 715.

Larceny defined.—Larceny is the wrongful or fraudulent taking of the property of another of some intrinsic value, without his assent and with the intention to deprive him thereof permanently—18 Cal. 369; 28 id. 390; 47 id. 103; 5 Cranch O. C. 422; 18 Mo. 321; McAll. 203; 36 Tex. 53; 8 C. 1 Green C. R. 348; 2 Leach, 1063; although he intends only to make temporary use of it—38 N. J. L. 176; 8 C. 1 Am. Cr. R. 399; and even if he did not intend to convert it to his own use—28 Cal. 381. It is compounded of the taking, the carrying away, and the felonious intent—16 Cal. 371. There must be the element of trespass to complete the offense—43 N. Y. 61; 56 id. 394. The larceny of several articles belonging to different owners, at the same time, is one offense—57 Ga. 171; 8 C. 2 Am. Cr. R. 344; 23 Ohio St. 339; 8 C. 2 Green C. R. 542; 45 Tex. 77; 23 Am. Rep. 602; 14 Ind. 327; 1 Tex. Ct. App. 48; 3 id. 40; 10 Humph. 101; 7 Mo. 85; see 2 McMull. 382; 2 Mass. 400. When a second thief steals goods from the first thief, it is larceny—6 Pac. O. L. J. 453; 21 Mo. 14; 3 Hill, 396; 1 Leach, 522. Parties in pursuance of a common

intent and previously formed design, acting together, are all principals, whether present or not—3 Tex. Ct. App. 413; 7 id. 361.

Subjects of larceny.—Every kind of property which has an intrinsic value, however small, is subject of larceny—3 Hill, 194; 9 Car. & P. 349; as a box of matches—45 Ala. 29; or a piece of paper on which a void instrument is written—Russ. & R. C. C. 181; 1 Denison, 69; a coffin in which a body is interred—63 Mo. 208; S. C. 2 Am. Cr. R. 638; illuminating gas—4 Allen, 308; intoxicating liquors, though bought to sell illegally, and illegally transported—9 Gray, 139; or the money obtained by its illegal sale—10 Cush. 397; articles kept and used for gambling—3 W. Va. 685; chandeliers, and it is immaterial if the severing and carrying away were immediate and continuous, are subjects of larceny—14 Bush, 31.

Mail matter.—Money, gold-dust, or any other valuables sent through the mails, are subjects of larceny—Deady, 555; 2 Blatchf. 108; 8 Port. 461. It is not larceny at common law to take another's letter, which has no value and does not import any property in possession—6 Johns. 103. Under the act making it an offense to steal the mail, etc., a post-office may be a desk, trunk, or box, carried about a house, or from one building to another—2 Blatchf. 108; and a post-office clerk may be liable without removing the letter from the building—2 Blatchf. 108. A decoy letter is within the act—2 Blatchf. 490. The act applies only where the letter is obtained wrongfully from the post-office or the carrier, to constitute the offense of opening, secreting, embezzling, or destroying a letter—2 Blatchf. 104; but if the letter was obtained by an agent, with the consent of the owner, it is larceny—6 McLean, 598. Money, gold-dust, and other valuables, are subjects of larceny—Deady, 555; 2 Blatchf. 108; 8 Port. 461. If an errand-boy was authorized to receive the letter, and receives it, he is not guilty of embezzlement under the act—1 Low, 304; 6 McLean, 598. An employé has no special property in the letters which will prevent his stealing from being larceny—3 McLean, 408; 8 Cox C. C. 491. See *post*, § 505.

The intent.—The taking must be wrongful and fraudulent, with the intent to permanently deprive the owner of his property—1 McAll. 196; 8 Port. 461; 53 Ala. 531; 2 Ill. 490; 67 N. C. 60; Thach. C. C. 477; 36 Tex. 375; 1 Port. 118; 9 Yerg. 397; 52 Ala. 441; 53 id. 381; 41 Conn. 590; S. C. 1 Am. Cr. R. 392; Russ. & R. C. C. 292; see 38 N. J. L. 176; 1 Am. Cr. R. 398. An intent wholly to deprive is sufficient—36 Tex. 375; S. C. 1 Green C. R. 348; without advantage or gain to himself, *lucri causa*, is not necessary—28 Cal. 380; 35 Miss. 214; 10 Ala. 814; 52 id. 441; 9 Car. & P. 345; as an intent to destroy the property taken—28 Cal. 380; 35 Miss. 214; 17 Tex. 521; 52 Ala. 441; in effect overruling 8 Port. 461; or where a deed was given for examination and destroyed—Thach. C. C. 157; or where a bank officer exhibited to defendant his note to examine, and he concealed or destroyed it—41 Conn. 590; S. C. 1 Am. Cr. R. 392; only injury to the owner need be sought—52 Ala. 413. That the taking must be *animus furandi*, or as *lucri causa*—18 Mo. 321; 8 Port. 461; McAll. 201; 2 Har. (Del.) 529; 5 Car. & P. 524; 2 East, 685; McAll. 196; 55 Mo. 83; S. C. 2 Green C. R. 613; 35 Mo. 229; 9 id. 663. The intent to deprive temporarily is sufficient—38 N. J. L. 176; 1 Am. Cr. R. 388; 4 Dutch. 28. There can be no larceny without a felonious intent—53 Ala. 531; 19 Me. 249; Law R. 1 C. C. 210; id. 150; it is the essence of the offense—12 Nev. 337; 55 Ala. 148. So, where the taking was open, innocence will be presumed—53 Ala. 531; 8 Smedes & M. 401. It will be simply trespass—38 Ala. 384; 8 Smedes & M. 401. But where property is left with another through inadvertence, and he conceals it, it is larceny—17 Wend. 460. So, throwing goods off a railroad train in motion, with a felonious intent, is larceny—41 Tex. 215; S. C. 1 Am. Cr. R. 423. Secrecy in carrying away, any attempt at concealment, or false denial of possession, distinguishes larceny from mere trespass—53 Ala. 381; such acts are evidence of a felonious intent—11 Fla. 295. So, taking a horse, and concealing it to obtain a reward, or until the owner is induced to sell

it at a sacrifice—105 Mass. 163. See Desty's Crim. Law, title LARCENY.

The taking.—There must be an actual or constructive taking; and a mere looking at a dead hog lying in a corner of the fence and covered with leaves, is not sufficient—72 N. C. 376; or the mere upsetting of a barrel of turpentine with a felonious intent is not a taking—65 N. C. 295. The essence of the offense is, that the property be taken against the will of the owner—9 Yerg. 198; id. 357; Law R. 1 C. C. 154. So, if to trap a man, the owner leaves his property exposed, and, through an agent, incites the thief to take it, it is not larceny—55 Ga. 391; S. C. 1 Am. Cr. R. 415; and the property must have been either in the actual or constructive possession of the owner—Law R. 1 C. C. 154. The theft need not necessarily be secret and without knowledge of the owner; it may be done by deception, artifice, or fraud—41 Conn. 590; S. C. 1 Am. Cr. R. 392; 53 N. Y. 111. Violence is not necessary, as fraud may supply its place—1 Pick. 375.

The asportation.—Asportation and intent to steal are necessary elements of the crime—47 Cal. 105. There must be a severance from the possession of the owner—8 Port. 511; as by enticing cattle by placing food—8 Port. 511; 30 Mo. 92; or by leading—15 Cal. 409; 30 Mo. 92; or driving—15 Cal. 409. The least removal, with intent to steal, is sufficient—20 Ohio St. 508; as taking money from where the owner put it, and dropping it when discovered—id. The thief need only have a momentary possession—Coxe, (N. J.) 439; 8 Port. 511; 65 N. C. 305. Any change in site enables an asportation to be presumed—1 Moody C. C. 107; Russ. & R. C. C. 387; 1 Craw. & D. 366; Law R. 1 C. C. 315. A fraudulent taking, under the Texas statute, is sufficient, without asportation—32 Tex. 157; 3 Tex. Ct. App. 70; 6 id. 455.

Taking by a trick.—Where property was obtained by trick or fraud, without the intention to pay for it, it is larceny—12 Cox C. C. 269; S. C. 1 Green C. R. 30; or with the intent to steal it—12 Cox C. C. 474; S. C. 1 Green C. R. 154. Obtaining property by personating the owner is larceny—12 Allen, 181; 121 Mass. 361; as personating the owner of a watch at a jeweler's, paying for the repair and taking it away—12 Allen, 181; or obtaining a parcel from a carrier's servant, if done *lucris causa*—1 Tex. Ct. App. 204; where a bill was handed in payment for a less amount and the whole was appropriated—56 N. Y. 394; 16 Ill. 506; or where one got possession of his own note, with a felonious intent—41 Conn. 590; S. C. 1 Am. Cr. R. 392; or to indorse it, and carried it off—1 Denio, 120; or where a shopman put clothes in the hands of a customer, who carried them off—5 Gray, 83; 64 Barb. 426; or where one took a bond, due by him, to examine it, and destroyed it—10 Gratt. 758. Fraudulently obtaining money, under color of a bet—Russ. & R. C. C. 413; or inducing another to play cards and winning his money by a trick—6 Baxt. (Tenn.) 522; or by a fraudulent device, as the "five-cent trick," is larceny—3 Helsk. 53; S. C. 1 Green C. R. 356. Obtaining money by the confidence trick, as, where one of two confederates persuaded another to let him have money to wager on dice, promising to pay it back from a check he pretended to have, and the other confederate won the money, it is larceny in both confederates—67 N. Y. 322; S. C. 2 Am. Cr. R. 345. A person may be convicted, although the property was obtained by connivance with a servant of the owner—17 Minn. 76.

Obtaining goods by fraud.—Where property is obtained by false pretenses, a felonious intent is necessary to make it larceny—4 Leigh, 689. If the owner parts with the possession merely, and not the title, it is larceny—124 Mass. 325; 1 Port. 118; 19 Tex. 326; 5 Tex. Ct. App. 122; as where a magistrate refused to return property taken from accused on his examination—24 Md. 553; or where a person left his property in charge of another, who converted a part of it—1 Cold. 120; or where a person expects that the same thing will be returned to him, the con-

version may be larceny—17 Ill. 339; 43 id. 397; 41 N. H. 533; 13 Gratt. 803. But if the owner is deceived into parting with the possession and the title also, it is not larceny but false pretenses—6 Hun, 509; 5 Hill, 294; 1 Port. 118; 19 Tex. 326; 5 Tex. Ct. App. 122; neither the taking nor the conversion is felonious—62 Ill. 127. Where the goods were transferred so as to create any trust or right of property, the indictment cannot be maintained—1 Port. 118; 1 Moody C. C. 160; 7 Cox C. C. 104; as where goods are delivered on credit—4 Leigh, 689; 5 Hill, 294; 8 Cowen, 238; 15 Serg. & R. 93; Russ. & R. C. C. 225; 9 Car. & P. 741. See 1 Leach, 467; 2 id. 614; 1 Moody C. C. 119; Leigh & C. 61; 2 East P. C. 673.

Parting with goods for specific purpose.—If the owner parts with the property for a particular purpose, and the receiver with fraudulent intent converts it, it is larceny—15 Serg. & R. 93; 2 Nott & McC. 50; 12 Bush, 176. So, where money was delivered to a man, to be delivered by him to his wife, to be by her invested in stocks for the use of the owner, and the defendants intended to convert it to their own use, it is larceny in both—55 Cal. 185; but if the owner parts with and gives possession absolute of the property, it is embezzlement—12 Bush, 176; 15 Serg. & R. 93. Fraudulently obtaining a check and converting it and receiving a soldier's discharge, is larceny of both—103 Mass. 425. Inducing a person to consign goods, and then converting them, is larceny—17 Hun, 396; 53 N. Y. 111; 4 Hun, 511; 12 Cox C. C. 269; 5 Rich. 237; 24 Gratt. 563; 36 Miss. 593; 3 Parker, 590. If one takes possession of his own certified check to purchase silver therewith for the bank, and he uses the check for his own purposes, it is larceny—53 Cal. 284. In such case, the check remained the property of the bank—id.

Taking by owner.—A man cannot be convicted for taking his own property—9 Cal. 250; but he cannot retake stolen property by a breach of the peace—50 Ala. 148; S. C. 1 Am. Cr. R. 57; yet a man may be guilty for taking his own property from a bailee—34 Cal. 671; if the intent be to charge bailee, or impose a loss on him—37 Cal. 51; 34 id. 671; 18 id. 369; 10 Wend. 166; 111 Mass. 392. See 7 Tex. Ct. App. 659; 26 Ala. 90. If the general owner of attached property takes a part of the property to defraud attaching creditors, it is larceny—111 Mass. 392. A joint owner, or tenant in common, by taking the whole property out of the hands of the bailee, is liable—26 Ala. 90; 29 id. 206; 7 Tex. Ct. App. 27; Russ & R. 478; id. 470; the title to the whole is in the tenant until division and delivery—66 Ill. 245; 29 Ark. 575. See 50 Ala. 66; 55 N. H. 540; 7 Tex. Ct. App. 27.

By bailees.—Bail is the giving of any property to any person for any purpose—9 Low. Can. J. 247. Bailees under this section are bailees to keep, transport, and deliver—8 Cal. 42. They may be indicted for larceny on converting the property to their own use—19 Cal. 601; 23 id. 280. It is larceny to use any bailment or agency as a means of procuring possession of property with intent at the time to fraudulently appropriate it—3 Helsk. 53; S. C. 1 Green C. R. 356. Where a bailee obtains possession of property with intent to steal, and carries out his intent, he is guilty of larceny—23 Cal. 280; that it need not be *animus furandi*, but merely a fraudulent conversion—see 82 Pa. St. 472; S. C. 2 Am. C. R. 362; *contra*, 1 Kerr, 116. The chief distinction between larceny and embezzlement is, that in larceny the guilty party has, and in embezzlement he has not, possession of the property at the time of the commission of the offense—37 Cal. 53. If the intent to steal did not exist at the time of taking, but afterward, it is embezzlement—23 Cal. 280.

By agent or servant.—Where property, when appropriated by a servant, was in the actual or constructive possession of the master, it is larceny and not embezzlement—99 Mass. 428; 63 N. C. 556; as, a servant who has care of horses in a stable, who may be convicted of stealing one of the horses—37 Cal. 51. The possession of the servant, in

such cases, is the possession of the master—1 Denio, 120; 1 Bay, 242; 4 Wash. C. C. 700. A servant, who has only the custody of the goods, and converts them, is guilty of larceny—99 Mass. 428; 20 Wis. 74; Law R. 1 C. C. 295; so, where corn was delivered to a miller to be ground—1 Pick. 375; 2 Up. Can. C. P. 288; or material received by a mechanic, if a part is converted to his own use, it is larceny—9 Gray, 5. So where a constable converts the proceeds of property sold by him at private sale, he is guilty of larceny—62 Ill. 127; S. C. 2 Green C. R. 561. Embezzlement by agents and embezzlement by trustees are distinct offenses.

Borrowing and hiring.—Where a bailee obtains possession of property, by borrowing or hiring, with a fraudulent intent to convert it, it is larceny—35 Mo. 229; otherwise at common law—20 Ala. 428; so, where a person borrowed a horse with felonious intent—64 N. C. 586; or, where he hires a horse and absconds with it—23 Up. Can. Q. B. 120; 4 Mo. 461; 7 Leigh, 752; see 32 Vt. 569; *contra*, 9 Yerx. 397; or trades it off, it is larceny—35 Tex. 738. It is larceny, although he did not sell or dispose of it—32 Vt. 569. But it is not larceny unless the bailment was to redeliver the identical chattel or money—1 Fost. & F. 647; 2 id. 14; Leigh & C. 58; when it will be obtaining by false pretenses—26 Ohio St. 15; S. C. 2 Am. Cr. R. 98.

By carrier.—A carrier, converting part of the goods intrusted to him, is guilty of larceny—4 Mass. 580; 8 id. 518; Russ. & R. C. C. 337; or, a shipmaster breaking bulk by taking casks from the hold—Russ. & R. C. C. 92; 7 Car. & P. 325; so, where a laborer, hired to unload, takes part of the cargo—1 Cush. 5; taking a whole package, as well as a part of it, is larceny—4 Mass. 580. A carrier, hired to cart coals to specified persons, who sells the coal and appropriates the proceeds, is guilty of larceny—10 Cox. C. C. 239; 14 Week. R. 679. The wrongful taking from a canal-boat, by the captain, of part of cargo, is larceny—17 N. Y. 114.

By clerk.—A clerk in a mercantile house has a qualified and limited possession of the goods as to strangers, but, as against his principal, he has neither the possession nor the right of possession—36 Tex. 553; S. C. 1 Green C. R. 646. So, if he converts a bill of exchange, it is larceny—1 Low. 269; 3 Bos. & P. 596; or, where he feloniously appropriates a draft—5 Hun, 401; or, where a teller of a bank wrongfully converts money to his own use, which he abstracted at night—116 Mass. 1; or, where a salesman abstracts part of the goods and converts them—8 Leigh, 743; 26 Ind. 101; 2 Tyler, 352; 104 Mass. 548. So of a night-clerk of a store—36 Tex. 553.

485. One who finds lost property, under circumstances which give him knowledge of or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person not entitled thereto, without first making reasonable and just efforts to find the owner and restore the property to him, is guilty of larceny.

Lost property.—Lost property is subject of larceny—58 Ala. 435; Bell's C. C. 22. The finder of lost property is guilty of larceny, where he knows or has the means of knowing the owner, and he appropriates the property found to his own use—9 Conn. 527; 20 Iowa, 267; 2 McMull. 562; 116 Mass. 42; S. C. 1 Am. Cr. R. 417; 58 Ala. 425; 25 Iowa, 273; 10 Ill. 305; 5 Cox C. C. 390; S. C. 2 Lead. C. C. 422; 4 Smedes & M. 349; but see 1 Mart. & Y. 226; as, where a number of watches were blown

from a watchmaker's window, and he picks one up and conceals it—2 Sneed, 285; 4 *id.* 357; or, if dropped from the pocket of owner, and he picked it up and appropriated it—20 Iowa, 267. He must know the owner at the time of the finding, or the goods must have some mark by which the owner could be ascertained—1 *Hill*, 94; 13 *Gratt.* 725; 14 *id.* 635; as, where a name is written on a check—9 *Conn.* 527; 2 *McMull.* 502; or, one drawn to a particular person—*Jebb* C. C. 9; but if there be no marks it is not larceny—1 *Ill.* 227; 1 *Hill*, 97; 18 *Mo.* 321; 14 *Johns.* 293; 49 *Iowa*, 73; 5 *Yerg.* 154; 6 *Ill.* 305; 14 *Gratt.* 635; 2 *Up. Can. L. J.* 19; *Dears.* 580; 1 *Denison*, 387; 2 *Car. & K.* 831; 3 *Cox* C. C. 453; 2 *Lead. C. C.* 34; as, where a pocket-book has no mark—1 *Denison*, 387; 2 *Car. & K.* 831; 3 *Cox* C. C. 453. Where the owner is unknown it is larceny, unless he is wholly unknown—65 *N. C.* 313. Where a person picks up anything when he knows that he can immediately find the owner, but, instead of restoring the article, appropriates it, it is larceny—8 *Car. & P.* 346; or, if he had reasonable ground to believe that he can find the owner, it is larceny—11 *Allen*, 548; 29 *Ohio* St. 184; *S. C.* 2 *Am. Cr. R.* 337; 8 *Cox* C. C. 416; *Leigh & C.* 1; *Dears.* 402; 6 *Cox* C. C. 415; as, in case of cotton falling from a train—58 *Ala.* 381; or, a servant finding bank-notes in her master's house—8 *Car. & P.* 176; or, jewelry found in the owner's garden—1 *Car. & K.* 245; or, a pocket-book left by a customer—1 *Humph.* 228. If the prisoner, within a reasonable time, could have found the owner, whom he believed he could find, but instead of waiting he immediately converts it to his own use, it is larceny—12 *Cox* C. C. 102; *S. C.* 2 *Green* C. R. 37. See generally, 19 *Miss.* 249; see *Civ. Code*, §§ 1864-1872, and *Pol. Code*, §§ 3136-3142.

Right to appropriate.—The finder of lost goods may take them into his possession, if done without a felonious intent, and no subsequent felonious intent will make him guilty—116 *Mass.* 42; 22 *Conn.* 153; 3 *Dev.* 473; 14 *Johns.* 293; 8 *Jones*, (*N. C.*) 399; 63 *Ind.* 223; 14 *id.* 36; 57 *id.* 102; *Law R.* 1 *C. C.* 139; 11 *Cox* C. C. 103; 5 *Up. Can. L. J.* 143; *Bell's* C. C. 27. So as to estrays—63 *Ind.* 285; *id.* 223; 12 *Cox* C. C. 489. If he takes them with intent to appropriate them, really believing the owner cannot be found, it is not larceny; but if he reasonably believes the owner can be found, it is larceny—116 *Mass.* 42; 29 *Ohio* St. 184; 58 *Ala.* 425; 2 *Car. & K.* 831; *S. C.* 2 *Lead. C. C.* 409; 1 *Denison*, 387; 3 *Cox* C. C. 453; 2 *Car. & K.* 831; 3 *Cox* C. C. 453; 1 *Lewin*, 251; but if the intent is formed afterward, even though he knew the owner, it is not larceny—1 *Hill*, 46; 1 *Humph.* 228; 58 *Ala.* 425; *Mart. & Y.* 226; 13 *Gratt.* 757; 22 *Conn.* 153; 18 *Mo.* 321; 14 *Gratt.* 636; 19 *Mo.* 253; 1 *Parker* Cr. R. 10; 3 *id.* 138; *Bell's* C. C. 34; 1 *Lewin*, 251; 3 *Craw. & D.* 30.

Of articles mislaid.—Placing an article on a table, neglecting, or forgetting it, is not a losing, and a felonious appropriation of it is larceny—21 *Ala.* 240; so, where one left his purse, unintentionally, in a stable—4 *Sneed*, 357; 2 *id.* 285; or where articles are left in a vehicle—2 *East P. C.* 664; 1 *Leach*, 413; *id.* 415; or where money was left in a bureau sent to be repaired—2 *Leach*, 352; or to be sold—7 *Mees. & W.* 623; or where a ring was accidentally left in a wash-tub—33 *Conn.* 260; or where property was, by inadvertence, left in possession of another—17 *Wend.* 460; 21 *Ala.* 240; or where a horse is astray—7 *Tex. Ct. App.* 470; 21 *Tex.* 472; 28 *Mo.* 530; 1 *Lewin*, 195; or sheep; but not if driven off by mistake—3 *Parker* Cr. R. 129; 1 *Hale* P. C. 507.

486. Larceny is divided into two degrees, the first of which is termed grand larceny; the second, petit larceny. See *ante*, § 484, note.

487. Grand larceny is larceny committed in either of the following cases:

1. When the property taken is of a value exceeding fifty dollars.

2. When the property is taken from the person of another.

3. When the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, goat, sheep, or hog.

Grand larceny—is a distinct offense from burglary—29 Cal. 622; and is not subject to the doctrine of merger—48 Ala. 684; S. C. 2 Green C. R. 627; 29 Ala. 62; 36 Ind. 286; 37 Ala. 134. Larceny is included in robbery, and, on a charge of robbery, the jury may convict of burglary—33 Cal. 59. It is competent for the Legislature to declare that larceny of specific property shall be grand larceny—39 Cal. 406. Where there is one continuing transaction, the defendant may be convicted of grand larceny for the final carrying away, though there be several distinct asportations; but the mere retention of the fruits of several petit larcenies will not make him guilty of grand larceny—53 Miss. 407. See *ante*, § 484, note.

Subd. 1. Value.—The value of an article is what it will fetch in open market—68 Mo. 208; S. C. 2 Am. Cr. R. 638. The Legislature may declare the larceny of specific property designated shall be deemed grand larceny, without regard to its value—39 Cal. 406. Value is material only when the offense is graded by it—1 Ga. 573; but some value is necessary—40 Id. 229; as to the owner, but not necessarily as to others—Charlt. R. M. 518. The allegation of value is sufficient, if it is as certain as the language of the statute—9 Cal. 236.

Subd. 2. Larceny from the person.—Simple larceny, and larceny from the person, are distinct offenses—54 Ga. 184; S. C. 1 Am. Cr. R. 426. It is sufficient if there be an intent to appropriate, though the owner is not dissenting—3 Cush. 235; and in picking a pocket, actual asportation is not essential—99 Mass. 431; so thrusting the hand into one's pocket, seizing a pocket-book and lifting it about three inches from the bottom of the pocket, is sufficient—50 N. Y. 518; 42 Tex. 301; S. C. 1 Am. Cr. R. 424; and see 99 Mass. 431; or taking a watch from the pocket, though the chain catches and prevents its asportation—1 Up. Can. L. J. 16; Dears. 621. There can be an attempt to commit an act only when there is such a beginning as, if uninterrupted, would end in completion—Leigh & C. 471; 9 Cox C. C. 497; S. C. 2 Lead. C. C. 478. The criterion which distinguishes robbery from larceny, is the violence; there can be no larceny with violence—12 Ga. 293; and snatching money out of a person's hand is larceny and not robbery—35 Ind. 460; 24 Gratt. 555. See *ante*, § 211, and note.

Subd. 3. Larceny of animals.—Any one who shall steal, etc., is guilty of grand larceny—39 Cal. 406. Domestic animals are subjects of larceny—58 Ga. 200; 28 Mo. 530; 3 Parker Cr. R. 129; 8 Gray, 497. So of the carcass of an animal killed with intent to steal it—55 Ala. 138. "Cattle" includes a bull yearling—45 Tex. 1; and "cow" includes a heifer—49 Cal. 70; so a steer is an animal of the "cow" kind—55 Ala. 150. The term "yearling" may apply to any animal a year old—55 Ala. 142. Hogs are subjects of larceny—24 Ga. 427; 26 Id. 633; 28 Id. 254; and a pig is a hog, within the statute—53 Ala. 29; 60 Id. 60. The theft of a "gelding" is the theft of a particular kind of property—1 Tex. Ct. App. 298; and a horse cannot be construed to include a gelding or a mare, etc.—3 Tex. Ct. App. 240. Where a party obtained a horse by false pretenses from a bailee, he is guilty of larceny as to the owner of the horse—12 Cox C. C. 568; S. C. 2 Green C. R. 16. Poultry and peafowls, their young, and their eggs, are subjects of larceny—8 Gray, 497;

and partridges hatched and raised by a domestic hen—Law R. 1 C. C. 158; 10 Cox C. C. 23; and bees in possession of their owners—5 Blatchf. 498; 23 Gratt. 941; S. C. 2 Green, 658. At common law, wild animals are not subjects of larceny—5 N. H. 203; but may become such by being killed or confined—65 N. C. 315; 2 Russ. Cr. 83; 1 Hale P. C. 511; 1 Hawk. P. C. ch. 33, § 41; 4 Bl. Com. 235. So, doves and pigeons in the cote are subjects of larceny—9 Rich. 15; or fish in a tank, or confined, or dead—78 N. C. 481; 2 Russ. 1199; or deer in a park, or hare in a warren—2 Russ. Cr. 73; or oysters in the bed—2 Bish. C. L. 6th ed. §§ 773, 775; but a sable caught in a trap in the woods, is not a subject of larceny.

488. Larceny in other cases is petit larceny.

See *ante*, § 484, note.

489. Grand larceny is punishable by imprisonment in the State prison for not less than one nor more than ten years.

Cattle-stealing is felony in Georgia—58 Ga. 491; and in Texas the theft of certain animals under the value of twenty dollars is a felony—1 Tex. Ct. App. 628. In Tennessee horse-stealing is a capital offense—3 Helsk. 452; S. C. 1 Green C. R. 354. If the character of the property stolen be charged in the indictment, and the thief offer to return it, it will not mitigate the punishment—2 Tex. Ct. App. 148; see 5 Cal. 356. See *ante*, §§ 460, 484, notes.

Connected with adultery.—It is a felony for a man running away with another man's wife to take his goods, though with the consent of the wife—6 Cowen, 572; 43 N. Y. 503; 2 Lans. 370; 1 Denio, 549. An adulterer stealing jointly with the wife is guilty of larceny—6 Cowen, 572; 1 Denio, 549; 1 Moody C. C. 243; S. C. 2 Lead. C. C. 361. An intention to commit adultery is sufficient—Car. & M. 112; Bell, 95; 7 Cox C. C. 1; 10 id. 50. So an adulterer may be guilty of receiving stolen property—Leigh & C. 240; but he is not guilty if he merely assist the adulteress in carrying away necessary wearing apparel—Dears. & B. 187. Where a party eloped with a man's wife, taking her husband's pony, cart, and harness, which he sold, retaining part of the proceeds, he was guilty of larceny—12 Cox C. C. 19; S. C. 2 Green C. R. 31; 6 Cox C. C. 376; S. C. 2 Lead C. C. 362; but he cannot be convicted without proof of his having taken part in the asportation or in spending the sum stolen—12 Cox C. C. 627; S. C. 2 Green C. R. 32.

490. Petit larceny is punishable by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or both.

Second offense.—A statute providing that a second conviction for petit larceny makes one guilty of felony is not obnoxious to the Constitution—45 Cal. 432; 43 Mass. 413; 3 Gratt. 738. Petit larceny is declared a felony by the laws of Indiana—63 Ind. 376. See *ante*, CONSTITUTIONAL PROVISIONS, art. 1, § 16.

491. Dogs are property, and of the value of one dollar each, within the meaning of the terms "property" and "value," as used in this chapter.

Dogs.—At common law dogs are not subjects of larceny—26 Ohio St. 400; S. C. 2 Am. Cr. R. 338; 81 N. C. 527; 48 Ala. 161; 5 Up. Can. L. J. 143; 4 Bl. Com. 236; 1 Hale P. C. 512; nor in New York, except when

subject to taxation—1 Parker Cr. R. 593; 4 id. 386. See *post*, MALICIOUS MISCHIEF, § 597:

492. If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen.

At common law, choses in action, bonds, bills, or notes, or other evidences of debt, are not deemed subjects of larceny—5 Mason, 358; 5 How. (Miss.) 33; 1 Nott & McC. 91; 6 Johns. 103; 8 Coke, 33; 1 Leach, 408; unless they be valid and subsisting securities—1 Port. 118; see 3 Up. Can. Q. B. O. S. 341; but the statute puts them on the same footing as the money intended to be secured—3 Brev. 196. So bank-notes and United States treasury-notes are goods and chattels—5 Ark. 513; 29 Ala. 691; 5 Mason, 553; 8 Mo. 283; 4 Tex. Ct. App. 99; 1 Moody C. C. 218; 2 Leach, 1090; 4 Bos. & P. 1; 2 Leach, 958; Russ. & R. C. C. 67; *contra*, 2 Cranch C. C. 469; id. 133; see 1 Port. 33; 1 How. (Miss.) 262. Coupons on State bonds—7 Baxt. (Tenn.) 22; certificates of stock, as railway script—2 Up. Can. L. J. 59; a check and a soldier's discharge—103 Mass. 425; a receipt or release—2 Brev. 96; 3 Hill, 194; but, if taken before delivery, it is not larceny—4 Denio, 380. So, accountable receipts for money or for property in store, and shipping receipts, are subjects of larceny—4 Parker Cr. R. 245; 67 N. Y. 322; 3 Hill, 194; or redeemed bank-bills in possession of bank agent—10 Cush. 397. Records which concern realty are not subjects of larceny at common law—2 Strange, 1133; S. C. 1 Lead. C. C. 543; 1 Leach, 12; see 1 Hale P. C. 510; 2 East P. C. 596; 4 Bl. Com. 234.

493. If the thing stolen is any ticket or other paper or writing entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railroad or vessel or other public conveyance, the price at which tickets entitling a person to a like passage are usually sold by the proprietors of such conveyance is the value of such ticket, paper, or writing.

494. All the provisions of this chapter apply where the property taken is an instrument for the payment of money, evidence of debt, public security, or passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the makers thereof to any person as a purchaser or owner.

495. The provisions of this chapter apply where the thing taken is any fixture or part of the realty, and is sev-

ered at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time.

Property savoring of the realty.—At common law things which savor of the realty, and are part of the freehold, are not subjects of larceny—1 Hale P. C. 510; 4 Bl. Com. 232; 2 East P. C. 587. The rule does not apply to such things as are only constructively annexed, as belts used in machinery—11 Ohio St. 104; a key in a lock of a door—5 Blackf. 417; or ice in an ice-house—3 Hill, 395; but things severed from the realty are subjects of larceny—5 Har. (Del.) 192. Grain in a field is subject of larceny—2 Ball. 334; regardless of value—55 Ala. 116. Although outstanding crops are part of the realty, they are subjects of larceny—54 Ala. 238. See *post*, §§ 971, 972.

In committing trespass.—If a person, by committing trespass with a felonious intent, carries away and converts personal property to his own use, it is larceny—11 Cush. 483; as by stealing things affixed to the freehold—7 Car. & P. 665; as chandeliers attached to the building—14 Bush, 31; or silver-bearing ore—8 Nev. 262; S. C. 1 Green C. R. 335; or nuggets of gold separated by natural causes—64 N. C. 619; or turpentine which has run from trees into boxes—1 Leach, 12. To constitute theft of an article attached to the realty, there must be a severance prior to the asportation—4 Tex. Ct. App. 26. When the thing in its original state is not the subject of larceny, it is necessary that the act of taking be distinct from the act of severance—Law R. 1 C. C. 317. So, if the goods vest in the owner in the interval between the severance and removal, it is larceny—Law R. 1 C. C. 317; as potatoes dug and in pits—25 Up. Can. Q. B. 146. No particular space of time is necessary, only the severing and taking must be so separated as not to constitute the same transaction—8 Nev. 619. So, if copper pipes are carried away with a felonious intent, if severed at one time, and afterwards taken away—5 Har. (Del.) 192. Whether sufficient time had elapsed between the taking and carrying away to prevent them from constituting one transaction, is a question for the jury—8 Nev. 262; S. C. 1 Green C. R. 335.

Larceny from house.—A person may be guilty of larceny from a house, although the original entry was not felonious, or with intent to steal—10 Ga. 511; 14 Bush, 233. The entry must have been against the owner's consent, unless crime was meditated at the time of the entry—6 Ala. 855. In Massachusetts, housebreaking with intent to steal, and stealing in a dwelling-house, are distinct offenses—42 Pick. 1. There is in Texas no specific offense of theft from a house—4 Tex. Ct. App. 472. It is not included in burglary—29 Cal. 626. Larceny from a house may be committed in any house, whether within the curtilage or not—58 Ga. 430; 54 Id. 213; Charit. R. M. 84; so throwing off goods from a train in motion with a felonious intent is larceny—41 Tex. 215; S. C. 1 Am. Cr. R. 423. Stealing property hanging outside a store door is simple larceny, and not larceny from a house—41 Tex. 126; S. C. 1 Am. Cr. R. 420; nor is stealing clothes from the railing of a piazza—39 Ala. 679; nor cotton from an alley-way outside a warehouse—53 Ga. 248; S. C. 1 Am. Cr. R. 422. Stealing money from the trunk of a fellow-lodger while he is asleep is larceny in a dwelling-house—111 Mass. 429; 1 Tex. Ct. App. 220. Where a man committed larceny and threw the stolen property out of the window, the party receiving it is principal—Ryan & M. C. C. 96. A wife cannot steal from her husband's house—3 Gray, 450.

496. Every person who for his own gain, or to prevent the owner from again possessing his property, buys or receives any personal property, knowing the same to

have been stolen, is punishable by imprisonment in the State prison not exceeding five years, or in the county jail not exceeding six months, or by both; and it shall be presumptive evidence that such property was stolen, if the same consists of jewelry, silver, or plated ware, or articles of personal ornament, if purchased or received from a person under the age of eighteen, unless said property is sold by said minor at a fixed place of business carried on by said minor or his employer. [In effect February 28th, 1874.]

See §§ 971, 972, *post*.

Offense generally.—A party who was not present at the theft, but subsequently, with guilty knowledge, received and aided in the disposal of the goods, is not an accessory to the theft, but is liable as receiver—40 Cal. 599; 42 Ga. 221; 23 Ohio St. 130; 1 Green C. R. 530. It is a substantive crime—116 Mass. 1; 99 id. 428; 104 id. 548; and he may be prosecuted as principal—9 Conn. 527. If he receive them, simply to aid the thief in carrying them off, he is guilty as receiver—69 N. C. 29; 8 C. 1 Green C. R. 372. Receiving, at the same time, goods stolen from several parties, constitutes several offenses—2 Mass. 409; 3 Hill, 194. The property must be of some value, however small—41 Conn. 590; 3 Hill, 194; 46 Iowa, 116; 63 Mo. 98; Charlt. R. M. 518; 1 Port. 118; 4 Rich. 355; 37 Tex. 359; 21 Me. 20; 1 Mass. 245. A statute which prohibits buying, circulating, or aiding in the concealment of stolen goods, specifies four distinct offenses—6 Ala. 845. So, concealing stolen property, with guilty knowledge, is a grade of the offense—2 Tex. Ct. App. 304; id. 228. In Ohio, it is a misdemeanor—23 Ohio St. 130; 8 C. 1 Green C. R. 530. It was intended by the statute to punish the receiver where it might be impossible to identify the thief, as in cases of professional receivers—43 Cal. 197; so, persons receiving stolen goods do not thereby become guilty of larceny—24 Cal. 14. See 2 Strob. 273. The common-law offense is enlarged by making the receiver equally guilty as the thief—2 Mich. 422.

Property must have been stolen.—It must have been stolen before a receiver can be convicted—55 Ga. 296; 52 Ind. 379; 4 Strob. 300; see 5 Gray, 82; 7 id. 43; 1 Up. Can. L. J. 55; 6 Car. & P. 399; Law R. 1 C. C. 270; and the stealing must have been done by some other person—4 Strob. 300; 13 Ired. 338; 37 Mo. 58; 6 Car. & P. 399; 9 id. 365; but see 6 Cox C. C. 554.

Guilty knowledge.—The receiver must have knowledge that the property was stolen—33 Ala. 434; 60 Ill. 119; id. 254; 73 N. C. 484; 41 Ala. 393; 120 Mass. 198; 3 Blackf. 28; see 3 Hill, 194; and guilty knowledge is a crime when the receiving was for the purpose of concealment or profit—33 Ala. 434; 3 Met. (Ky.) 417. Guilty knowledge may be inferred from the facts—9 Conn. 527; 7 Vt. 118; see 52 Ala. 379; 33 id. 434; 3 Heisk. 215; as from possession—9 Conn. 527; 7 Vt. 118; but bare possession is not sufficient—13 Mich. 351; 10 Cush. 535; 48 Iowa, 172. See 12 Cox C. C. 517; 4 Fost. & F. 315. Evidence of the principal felon, with corroborative facts, is sufficient—10 Cush. 535; or by proof of other instances of receiving—41 Ala. 405; 3 Met. (Ky.) 417; 23 Ohio St. 130; 3 Parker Cr. R. 335. See 10 Cush. 531; 55 N. Y. 81; 88 id. 555; 6 Car. & P. 177; 1 Moody C. C. 146; 1 Fost. & F. 51; 2 Denison, 264.

Receiving.—The property must be received from the thief—2 Denison, 37; 6 Cox C. C. 449; 14 id. 111; but receiving from his agent is

sufficient—123 Mass. 430; so a second thief receiving from a first thief is a receiving—1 Car. & K. 739. Unless the owner has resumed possession previous to his receiving, the party must receive the goods, and aid in disposing of them—40 Cal. 599. It is sufficient if the receiver have control of the goods, a manual possession is not necessary—19 Iowa, 144; Const. S. C. 274; 6 Cox C. C. 353; id. 554; 2 Car. & K. 987; 2 Denison, 37; see 17 Iowa, 149. But a possession of commodities exchanged for the stolen goods is not a possession of the goods—3 Sawy. 547. Secreting the goods for the purpose of obtaining a reward is sufficient—3 Hill, 194; 3 Blackf. 28.

Intent.—The receiving must be felonious and fraudulent—1 Parker Cr. R. 564; 3 Helsk. 215; 78 N. C. 434; but see 6 Car. & P. 178; id. 335; with intent to deprive the owner thereof—5 Humph. 68. It is sufficient if he receives the goods as a friendly act to the thief, or to shelter or accommodate him—117 Mass. 141; 69 N. C. 29; see 6 Car. & P. 335; id. 177; as, where a passenger allowed a trunk of stolen goods to pass as part of his luggage—1 Const. S. C. 274. An intent to secrete the goods from the owner is sufficient—3 Helsk. 215; 1 Parker Cr. R. 564.

497. Every person who, in another State or country, steals the property of another, or receives such property knowing it to have been stolen, and brings the same into this State, may be convicted and punished in the same manner as if such larceny or receiving had been committed in this State.

Bringing stolen property into State.—The bringing into the State of goods stolen in the British Provinces is not larceny in this State—3 Gray, 434; S. C. 2 Lead. C. C. 371; 24 Ohio St. 166; S. C. 2 Am. Cr. R. 349; but see 11 Vt. 650; 49 Me. 181; 11 Mich. 327. See 2 East P. C. 772. *contra*, 1 Mass. 116; 2 id. 14; 9 Gray, 7; 123 Mass. 430. It is otherwise under the law of Canada—9 Am. Rep. 119; 35 Up. Can. Q. B. 603; S. C. 1 Am. Cr. R. 406; 24 Mich. 166; 3 Cox C. C. 74; 1 Dears. & B. 562. Property stolen in another State, and brought here, is larceny in this State 9 Gray, 7; S. C. 2 Lead. C. C. 378; 1 Har. & J. 340; 1 Mass. 116; 2 id. 114; 36 Miss. 593; 1 Root, 69; 3 Stewt. 123; the common-law rule being changed by statute—id.; 14 Ala. 486; 18 id. 727; 12 Mo. 453. In the absence of statute the thief cannot be convicted for property stolen in Canada—24 Ohio St. 166; S. C. 2 Am. Cr. R. 349; but the rule is otherwise as to a sister State—3 Cowen, 185; 11 Vt. 654; 49 Me. 181; 36 Miss. 593; 2 Oreg. 115; 14 Iowa, 479; 1 Duval, 153; 1 Mass. 116; 11 Ohio, 435. See 1 Cranch C. C. 269. So, the thief who steals goods in another State, and sends them here by an agent, may be indicted for larceny here—123 Mass. 430; but there must be proof that the taking was larceny in the first State—5 Allen, 630. The possession by the thief of stolen property is larceny in every county into which he carries it—47 Miss. 671; S. C. 1 Green C. R. 342; 17 Me. 193; 7 Leigh, 708; 7 Met. 475; 10 Mass. 154; as every moment's continuance of the trespass amounts to a new asportation—8 Nev. 208; S. C. 1 Green C. R. 344; and he is punishable under any new statute which may be passed—21 Me. 14. The rule extends as well to property made subject of larceny by statute, as to goods subject of larceny at common law—7 Met. 475. Under the Alabama statute, indictment lies in either county—55 Ala. 59; but the statute applies to live animals, not to dead ones—id. 138.

Liability of receivers.—A party may be guilty as a receiver in a county other than where the property was stolen—40 Cal. 599; or a State other than where it was stolen—2 Mass. 14; 45 Me. 606; but not if stolen abroad, under the common law—1 Cox C. C. 207.

498. Every person who, with intent to injure or defraud, makes or causes to be made any pipe, tube, or other instrument, and connects the same, or causes it to be connected, with any main, service-pipe, or other pipe for conducting or supplying illuminating gas, in such manner as to supply illuminating gas to any burner or orifice, by or at which illuminating gas is consumed, around or without passing through the meter provided for the measuring and registering the quantity consumed, or in any other manner so as to evade payment therefor, and every person who, with like intent, injures or alters any gas meter or obstructs its action, is guilty of a misdemeanor.

A person secretly appropriating gas by severing a portion in a service pipe of the company is guilty of larceny—4 Allen, 308; 6 Cox C. C. 213.

See 6 Cox C. C. 213.

499. Every person who, with intent to injure or defraud, connects, or causes to be connected, any pipe, tube, or other instrument, with any main, service-pipe, or other pipe, or conduit, or flume for conducting water, for the purpose of taking water from such main, service-pipe, conduit, or flume, without the knowledge of the owner thereof, and with intent to evade payment therefor, is guilty of a misdemeanor.

500. Every person who, in the city and county of San Francisco, saves from fire, or from a building endangered by fire, any property, and for two days thereafter corruptly neglects to notify the owner or fire marshal thereof, is punishable by imprisonment in the State prison for not less than one nor more than ten years.

See Pol. Code, § 3343.

501. Every person who purchases or receives in pledge, or by way of mortgage, from any person under the age of sixteen years, any junk, metal, mechanical tools, or implements, is guilty of a misdemeanor.

502. Sections three hundred and thirty-nine, three hundred and forty-two, and three hundred and forty-three of **THE PENAL CODE** are applicable to persons carrying on the business of junk dealers, and apply to their transactions of purchase and sale, as well as to those of pledge or mortgage.

CHAPTER VI.

EMBEZZLEMENT.

- § 503. "Embezzlement" defined.
- § 504. When officer, etc., guilty of embezzlement.
- § 505. Carrier, when guilty of embezzlement.
- § 506. When trustee, banker, etc., guilty of embezzlement.
- § 507. When bailee, tenant, or lodger guilty of embezzlement.
- § 508. When clerk, agent, or servant guilty of embezzlement.
- § 509. Distinct act of taking.
- § 510. Evidence of debt undelivered a subject of embezzlement.
- § 511. Claim of title a ground of defense.
- § 512. Intent to restore the property is no defense.
- § 513. Actual restoration a ground for mitigation of punishment.
- § 514. Punishment for embezzlement.

503. Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted.

See *ante*, §§ 211, 425, 484, and notes.

Embezzlement.—The fraudulent appropriation of the property of another by one to whom it has been intrusted, is embezzlement—37 Iowa, 404; 3 Parker Cr. R. 579; 7 Tex. Ct. App. 418; 4 Up. Can. L. J. 183; so, when property is voluntarily delivered to a person, who has not generally the care of his employer's property, and he converts it—3 Greene, (Iowa,) 67; 65 N. C. 317. It imports the reception of money belonging to a master or employer, and a fraudulent appropriation before it reaches his hands—10 Up. Can. C. P. 117. It was not an offense known at common law—4 Up. Can. L. J. 124; but is purely a statutory offense—31 Cal. 108; and nothing which was larceny at common law is included in it—61 Ill. 599; S. C. 2 Am. Cr. R. 114. The statute intends to punish acts which before were not punishable—28 Ind. 321; 7 Tex. Ct. App. 419. The statute of California was framed to comprehend those cases in which property is intrusted to clerks, servants, etc., by or for their masters, employers, etc.—37 Cal. 51; and the fraudulent conversion may be effected in any manner—7 Tex. Ct. App. 418. The statute is made applicable to attorneys who fraudulently convert their client's property—4 Tex. Ct. App. 763; the embezzlement of several articles at the same time being a separate embezzlement of each—100 Mass. 1. Where a person is induced by fraud to part with the title, it is embezzlement and not larceny—65 Ind. 321; 17 Ill. 339; 43 Id. 397; 5 Gray, 83. See *ante*, § 484.

The property.—The property must be the property of other than the defendant—2 Met. 343; 11 Met. 64; 107 Mass. 221; 2 Lewin, 256. A qualified ownership is sufficient as right of possession and control—7 Tex. Ct. App. 418.

Intent.—The fraudulent intent is to be determined from the evidence—7 Peters, 138; and it may be inferred from the facts, as

flight, concealment, and evasion—6 Cold. 307; 7 Tex. Ct. App. 419; 7 Car. & P. 388. If a person in one county is intrusted with personal property, and he takes it to another county and there embezzles it, he cannot be tried in the county where he received it, unless the intent to embezzle was conceived there—51 Cal. 378.

504. Every officer of this State, or of any county, city, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation, (public or private) who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement. [In effect April 6th, 1880.]

Corporate body.—A statute against embezzlement, from any corporate body in this State, does not include corporations doing business without authority of law—55 Ga. 236; S. C. 1 Am. Cr. R. 168. Where a bank cashier misapplied the funds of a bank, it is no defense that he believed his acts were sanctioned by some of the directors—11 Blatchf. 374; S. C. 2 Green C. R. 241. See *ante*, § 424, and note; and *post*, § 514.

505. Every carrier or other person having under his control personal property for the purpose of transportation for hire, who fraudulently appropriates it to any use or purpose, inconsistent with the safe-keeping of such property and its transportation according to his trust, is guilty of embezzlement, whether he has broken the package in which such property is contained, or has otherwise separated the items thereof, or not.

See notes to §§ 484, 504.

Embezzlement from mail.—To constitute embezzlement of mail matter, the letter must be obtained from the post-office or the carrier—2 Blatchf. 104; 4 Parker Cr. R. 164. If a post-office clerk takes a letter from the place of its deposit, he is guilty, although he does not take it from the building—2 Blatchf. 108. So, if a letter-carrier secretes, embezzles, or destroys a letter, packet, bag, or mail, he is liable—1 Colo. 315; and a decoy letter is within the statute—1 Curt. 364. When a letter is delivered to an authorized agent, it cannot be charged with having been embezzled—6 McLean, 598; 1 Low. 304; 2 Blatchf. 104; and generally the detention of a letter which came lawfully into a person's possession is not embezzlement—2 N. J. Law J. 181; see 2 Blatchf. 104; 6 McLean, 598; 1 Low. 303; as, on delivery to an errand-boy—1 id. 304; 2 Blatchf. 104; 6 McLean, 598; 2 Curt. 265. Where a barkeeper fraudulently converted a letter, containing money, intrusted to him to be

carried to the post-office, he is guilty of embezzlement—15 Wend. 581; but where A. intrusted B. with money to count, and B. walked away with it, it was not embezzlement—97 Mass. 584.

506. Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.

See notes to §§ 484, 504.

Trustees.—Embezzlement by trustees is a different offense from embezzlement by agents—82 Pa. St. 472; S. C. 2 Am. Cr. R. 362. Where a party receiving money has a right to mix it with his own, he is not indictable for so doing—2 N. Y. Supr. N. S. 383. The failure to pay over to a ward under age and married, after settlement of the estate, is not a felony—1 Lea, (Tenn.) 720. A person who appropriates to his own use money sent to him to be devoted to a particular purpose is liable—Law R. 2 C. C. 94; S. C. 1 Am. Cr. R. 157. It cannot consist of proceeds of trust property other than such as have accrued from its sale—6 Tex. Ct. App. 344. A creditor misappropriating collateral securities after debt due, if the trust be to return them after the debt is satisfied, is liable—10 Mass. 1; or fraudulently misappropriating government securities, although not indorsed—24 Iowa, 162. Where a bank treasurer alters the account-book of the bank to make it appear that deposit was made, and no proof that the deposit did not go with other bank funds, it is not embezzlement—1 Allen, 575.

Consignee.—The fraudulent misappropriation to his own use by a consignee or bailee is embezzlement—6 Tex. Ct. App. 344. So, where he denies the receipt, or makes a false statement or entry, or refuses to account for it—10 Gray, 173; but see 61 Ill. 382. The mere making of false entries and false accounts does not constitute the offense—118 Mass. 443.

Commission merchant.—Actual demand is indispensable to convict under the statute—61 Ill. 382; S. C. 2 Green C. R. 558.

507. Every person intrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement.

Bailee.—A bailee is within the statute, and the term bailee is not limited in the sense of a bailee, to keep, to transfer, or to deliver—19 Cal. 600; overruling 8 id. 42. The conversion of a bailee may be effected by sale, whether authorized or not—7 Tex. Ct. App. 419. If money is intrusted to a person only to be kept for a bailor, its conversion is not embezzlement—3 Gray, 461; but this rule has been modified by statute—100 Mass. 9. An innkeeper who fraudulently converts baggage is guilty of embezzlement—36 Mich. 306; S. C. 2 Am. Cr. R.

111. It is sufficient delivery to an innkeeper where checks for baggage are delivered to him—38 Mich. 306; S. C. 2 Am. Cr. R. 111. The fraudulent conversion of property by a bailee, or secreting it with a fraudulent intent to convert it, is embezzlement—51 Cal. 378.

508.—Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement.

Clerk or servant.—A clerk or servant appropriating money or goods intrusted to him in the course of his employment is guilty of embezzlement—15 Wend. 147; so of money received on bills collected—11 Nev. 287; denying 23 Cal. 577; so, if he obtains possession of goods with authority to dispose of them, he may be guilty—26 Ala. 17; 59 Ind. 229. A person assisting his father in his duties as clerk may be guilty of embezzlement as to his father, for converting the money of his father's employers—Law R. 2 C. C. 150; S. C. 1 Am. Cr. R. 153. A person engaged to solicit orders to be paid by commissions is not a clerk or servant—Law R. 2 C. C. 341; S. C. 1 Am. Cr. R. 150. Giving a person a watch to trade off for a wagon, for which service he was to be paid, is sufficient employment—37 Iowa, 404; S. C. 1 Am. Cr. R. 146. Appropriating money paid on his master's check is embezzlement—9 Cush. 284; or a bill of exchange—32 Ala. 589. Where no privity of employer and employe exists, it is not embezzlement—14 Gray, 62; so, where the owner's possession is divested—97 Mass. 584; though defendant had custody as his servant—97 Mass. 423. It cannot consist in fraudulent conversion of money paid over by mistake—14 Gray, 62. A clerk may commit more than one embezzlement, and be indicted for each—11 Nev. 287. A clerk about to leave, taking the amount due him from his employer, and entering the same on the books, is not guilty of embezzlement—35 Ill. 487. In case of embezzlement by a servant, demand and refusal are not necessary—22 Minn. 76. A commercial traveler is a servant—7 Up. Can. L. J. 331; 11 Cox C. C. 150; id. 490. Where money was received by a servant, but not in the name, or for or on account of his master, its conversion was not embezzlement—12 Cox C. C. 469; S. C. 1 Green C. R. 147.

Agents.—Embezzlement by agents may be committed by misappropriating money left with him for the purchase of lands—48 Mo. 531. So if money is placed in the hands of a person to be loaned on certain securities and interest, and he converts it—82 Ill. 425; S. C. 2 Am. Cr. R. 108; but if money is received by an agent in a manner not authorized by his agency, it is not received in the course of his employment—31 Cal. 108. Drawing a draft on his principal payable to a third person, if the principal pays it, is embezzlement—31 Cal. 108. The agent of a commissary is liable for the conversion of flour sent to a bakery—38 Ala. 415. The unauthorized appropriation of money by an agent or employe not authorized to receive it is not within the code making such larceny—49 Iowa, 141. Where money is placed in one's hand, to be loaned at interest, and he converts a part of it, it is embezzlement if he acts as agent, but not if he guarantees payment of the interest—82 Ill. 425; S. C. 2 Am. Cr. R. 109. So the agent is entitled to deduct his commissions out of the receipts—22 Minn. 41; S. C. 2 Am. Cr. R. 107. See 2 Met. 343; 11 id. 64; 107 Mass. 221.

Who not servants or agents.—An auctioneer is not the servant or agent of the owner of the property—2 Met. 343; nor the collector of bills for the proprietor of a newspaper—11 id. 64; nor is a constable

the servant of the creditor—5 Denio, 76; nor is he bailee—62 Ill. 127; nor is the keeper of a county poorhouse an agent or servant of the superintendent of an incorporated company—22 N. Y. 245; nor is a mechanic of the material supplied to him—9 Gray, 5; nor are parties as to each other, unless the contract is inchoate or incomplete—3 Tex. Ct. App. 522; nor is a person employed to solicit orders on a commission—Law R. 2 C. C. 34; 8. C. 1 Am. Cr. R. 150; id. 41.

509. A distinct act of taking is not necessary to constitute embezzlement.

See 15 Wend. 581.

510. Any evidence of debt, negotiable by delivery only, and actually executed, is the subject of embezzlement, whether it has been delivered or issued as a valid instrument or not.

511. Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him.

Claim of title.—If the defendant supposed he had a right as partner, he cannot be convicted—118 Mass. 443; yet a man may be convicted for embezzling his own mortgage—5 Allen, 502.

512. The fact that the accused intended to restore the property embezzled, is no ground of defense or of mitigation of punishment, if it has not been restored before an information has been laid before a magistrate, charging the commission of the offense.

Intent to restore.—It is no less embezzlement that the intent was to restore, and that the party had property to make restitution—10 Gray, 173; 4 Up. Can. L. J. 187. Embezzlement consists in the fraudulent misappropriation of bonds—100 Mass. 1; though with intent to restore them—97 Mass. 50. That he believed he would repay the money does not relieve the act of its fraudulent intent—41 Wis. 585; 8. C. 2 Am. Cr. R. 117.

513. Whenever, prior to any information laid before a magistrate, charging the commission of embezzlement, the person accused voluntarily and actually restored or tendered restoration of the property alleged to have been embezzled, or any part thereof, such fact is not a ground

of defense, but it authorizes the court to mitigate punishment, in its discretion.

514. Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled; and where the property embezzled is an evidence of debt or right of action, the sum due upon it or secured to be paid by it shall be taken as its value; *provided*, that if the embezzlement or defalcation be of the public funds of the United States, or of this State, or of any county, city and county, or municipality within this State, the offense is a felony, and shall be punishable by imprisonment in the State prison not less than one year nor more ten years; and the person so convicted shall be ineligible thereafter to any office of honor, trust, or profit under this State. [In effect April 6th, 1880.]

Punishment.—That a party is liable to prosecution for embezzlement of national bank-notes under United States statutes, does not relieve him from punishment under common law or under a State statute—116 Mass. 1. The punishment is the same as that for larceny—4 Met. 468.

CHAPTER VII.

EXTORTION.

- § 518. "Extortion" defined.
- § 519. What threats may constitute extortion,
- § 520. Punishment of extortion in certain cases.
- § 521. Extortion committed under color of official right.
- § 522. Obtaining signature by means of threats.
- § 523. Sending threatening letters with intent to extort.
- § 524. Attempts to extort by means of verbal threats.
- § 525. Officers of railroad companies making overcharges.

518. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

See *ante*, 211, 484; and 503.

Extortion.—The act to prevent extortion was designed to afford a remedy of a summary character against office-holders—45 Cal. 199. At common law, extortion is taking by color of office money or other thing of value that is not due—6 Cowen, 661; 3 Bush, 39, before it is due—6 Cowen, 661; 7 Pick. 279; 33 N. J. L. 142; 2 Sneed, 160; 1 Yerg. 361; 1 Mont. 322; 53 Ala. 125; 1 Lea, (Tenn.) 271; 5 Sneed, 69; 3 Sawy. 473; or more than is due—1 Yeates, 71. The officer must have acted in his official capacity—55 Ala. 125; 10 Mass. 210. The design to collect fees to which he was not entitled, constitutes the corrupt intent which is the essence of the offense—34 Ala. 254. A corrupt motive is essential—3 Brev. 175; 1 Mass. 228; 15 id. 525; 17 id. 410; 7 Leigh, 709; 2 Mo. 22; 1 Pick. 171; 7 id. 279; 15 Wend. 277; except where the bare taking is made indictable—36 N. J. L. 125; but the summary remedy has not taken away the common-law remedy—7 Pick. 279; 13 Serg. & R. 426. It is enough if any valuable thing is received—5 Blackf. 460; 1 Ld. Raym. 148; but a mere agreement to pay is not sufficient—16 Mass. 51; 5 id. 523; unless the agreement can be made the basis of a suit—1 Ld. Raym. 148. The taking must be willful and corrupt—34 Ala. 254; 1 Yeates, 71; 2 Mo. 22; 15 Wend. 277.

Who liable.—A public officer only can be convicted of this offense—56 Ga. 385; but that he is an officer *de facto* is sufficient—3 Ired. 171. See Desty's Crim. Law, § 84 b.

519. Fear, such as will constitute extortion, may be induced by a threat, either:

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or,
2. To accuse him, or any relative of his or member of his family, of any crime; or.

3. To expose, or impute to him or them any deformity or disgrace; or,

4. To expose any secret affecting him or them.

Extortion by others than officers.—Obtaining the property of another by threats, consists in the threatening, whether the threats did or did not produce the desired effect—2 Dall. 384; 26 Me. 71. The offense is sufficiently defined by statute—63 Ind. 399. It is enough if the threatening to accuse of crime was willful and intentional—122 Mass. 19; 119 id. 40; 3 Cush. 538; whether the party be innocent or guilty of the crime imputed to him—7 Car. & P. 479. As, threatening to accuse one of seduction and demanding money to let him go is a present threat—108 Mass. 488; or extorting a note upon the representation that a female is with child by him—15 Hun. 347; or accusing a man of keeping a woman as his mistress—54 Ind. 400; S. C. 2 Am. Cr. R. 18. So, a false statement that a warrant had been issued is a threat—12 Allen. 449; and a threat to complain to a police officer is a threat to accuse of crime—108 Mass. 18. So sending a letter threatening that if he did not pay a certain amount he would bring a prosecution against him, and send him to the penitentiary—30 Mich. 460; but see dissenting opinion, *id.* The word "maliciously" refers simply to the doing of the unlawful act without excuse—122 Mass. 19.

520. Every person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force, or any threat, such as is mentioned in the preceding section, is punishable by imprisonment in the State prison not exceeding five years.

521. Every person who commits any extortion under color of official right, in cases for which a different punishment is not prescribed in this Code, is guilty of a misdemeanor.

See *ante*, § 518, and note.

522. Every person who, by any extortionate means, obtains from another his signature to any paper or instrument, whereby, if such signature were freely given, any property would be transferred, or any debt, demand, charge, or right of action created, is punishable in the same manner as if the actual delivery of such debt, demand, charge, or right of action, were obtained.

523. Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to im-

ply, any threat such as is specified in section five hundred and nineteen, is punishable in the same manner as if such money or property were actually obtained by means of such threat.

Extortion.—Extorting money by a false statement that prosecution had been entered against him—22 Pa. St. 253; but not if the offer is made to illegally compromise the offense—Id.; 7 Car. & P. 191. A threat to falsely accuse, through hand-bills and newspapers, of keeping a woman as his mistress, with intent to extort money, is sufficient—54 Ind. 400; S. C. 2 Am. Cr. R. 18. Obtaining horses from an ignorant countryman by threats of a criminal prosecution for alleged horse-stealing, and by threats against his life, is indictable—1 Bay, 282. A conspiracy to extort money is *per se* an offense at common law—6 Dowl. & R. 345; 4 Barn. & C. 329; S. C. 2 Lead. C. C. 34. See Desty's Crim. Law, § 84.

Threatening letters.—A letter in defendant's own name, sent to enforce payment of a debt, is not within the statute—2 Barb. 427; see 1 Leach, 445; 2 East P. C. 1116. Dropping a letter in a man's way is a sending—Russ. & R. 398. To put a letter in a place where it would be likely to be seen by the person to whom it is directed is an uttering—5 Cox C. C. 226.

524. Every person who unsuccessfully attempts, by means of any verbal threat, such as is specified in section five hundred and nineteen, to extort money or other property from another, is guilty of a misdemeanor.

525. Every officer, agent, or employé of a railroad company, who asks or receives a greater sum than is allowed by law for the carriage of passengers or freight, is guilty of a misdemeanor.

See Civ. Code, §§ 489, 2174, 2168, 2180-2191, 2194-2203.

CHAPTER VIII.

FALSE PERSONATION AND CHEATS.

- § 528. Marrying under false personation.
- § 529. Falsely personating another in other cases.
- § 530. Receiving property in a false character.
- § 531. Fraudulent conveyances.
- § 532. Obtaining money by false pretenses.
- § 533. Selling land twice.
- § 534. Married person selling lands under false representations.
- § 535. Mock auction.
- § 536. Consignee, false statement by.

528. Every person who falsely personates another, and in such assumed character marries or pretends to marry, or to sustain the marriage relation towards another, with or without the connivance of such other, is guilty of a felony.

A mere promise of marriage is not sufficient—2 Moody C. C. 254. See Civil Code, § 58.

529. Every person who falsely personates another, and in such assumed character, either—

1. Becomes bail or surety for any party in any proceeding whatever, before any court or officer authorized to take such bail or surety; or,

2. Verifies, publishes, acknowledges, or proves, in the name of another person, any written instrument, with intent that the same may be recorded, delivered, and used as true; or,

3. Does any other act whereby, if it were done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person;

—is punishable by imprisonment in the county jail not

exceeding two years, or by fine not exceeding five thousand dollars.

False personation.—Assuming a fictitious name is a false pretense, if it influences the obtaining of money or goods—19 Pick. 179; so, of obtaining goods to be sent out of the State—105 Mass. 172; so, of assuming the name of another to whom money is due—19 Pick. 179; 2 Pars. Cas. 332; 6 Cox C. C. 515; 9 Ad. & E. 276; Russ. & R. C. C. 81; 7 Car. & P. 784.

530. Every person who falsely personates another, and in such assumed character receives any money or property, knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use, or to that of another person, or to deprive the true owner thereof, is punishable in the same manner and to the same extent as for larceny of the money or property so received.

A false character.—A false representation of being agent of a party having ample means is within the statute—6 Cox C. C. 515; or falsely pretending to be a certain attorney—7 Car. & P. 191; or a certain clergyman of standing—41 Miss. 570; 84 N. Y. 351; or a constable, and obtaining property by extortion—22 Pa. St. 253; 7 Car. & P. 191; *contra*, 4 Barb. 151; 46 N. Y. 470; 4 Hill, 9; or that he was an officer and had a warrant to arrest a person—49 Ind. 367; 59 Id. 229; and thereby obtaining a promissory note—65 Id. 317; or that he was a captain of a company, and obtained money on an assignment of his claim for bounty—6 Parker Cr. R. 31; see 9 Ad. & E. 271; 9 Cox C. C. 158; or falsely personating a physician, and thereby inducing the purchase of a valueless medicine—Car. & M. 537; or by falsely assuming the dress of a college student—2 Pars. Cas. 333. Where a married woman obtained general credit by pretending to be unmarried—Sayers, 229.

531. Every person who is a party to any fraudulent conveyance of any lands, tenements, or hereditaments, goods, or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment, or execution, contract or conveyance, had, made, or contrived, with intent to deceive and defraud others, or to defeat, hinder, or delay creditors or others of their just debts, damages, or demands; or who, being a party as aforesaid, at any time wittingly and willingly puts in, uses, avows, maintains, justifies, or defends the same, or any of them, as true, and done, had, or made in good faith, or upon good consideration, or aliens, assigns, or sells any of the lands, tenements, hereditaments, goods, chattels, or other things before mentioned, to him or them conveyed as aforesaid, or any part thereof, is guilty of a misdemeanor.

Fraudulent conveyances.—Selling, removing, or otherwise disposing of mortgaged property, with intent to defraud the lien-holder, is indictable—55 Ala. 120; 3 Tex. Ct. App. 502; but the sale must be without mortgagee's consent, and without notice to the buyer—105 Mass. 586. So, fraudulently mortgaging personal property to prevent its being taken on mesne process—36 N. H. 196.

532. Every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets into possession of money or property, is punishable by imprisonment in the county jail not exceeding one year, and by fine not exceeding three times the value of the money or property so obtained.

Obtaining money by false pretenses.—The offense is committed by a carrier receiving the price of freight on the false representation of carriage of the goods—2 East P. C. 672; or of their delivery—2 East, 30; or by a clerk, after his discharge, collecting a bill of his late employer—21 Pick. 509; or by a creditor on a new and valid consideration which is never given—5 Parker Cr. R. 490; or an employer obtaining money from an employé on a false pretense of hiring—22 N. Y. 413; 11 Cox C. C. 85; or inducing another to advance money on a joint business—114 Mass. 325; or where a postman falsely represented that money was due—10 Cox C. C. 369; or falsely representing a certain amount due, and retaining the balance in excess of the true amount due—64 Ind. 498; 9 Cox C. C. 222; 2 East P. C. 830; or a servant obtaining money from a store on the false representation that it was for his master—3 Phill. 613; 2 Russ. Cr. 613; or obtaining goods—12 John. 292; 14 Id. 371; 1 Cold. 333; 12 Met. 446; or where a borrower induces the lender to deliver certain bank-bills by fraud and false pretenses—26 Ohio St. 15; S. C. 2 Am. Cr. R. 96; or where an agent obtained money after revocation of his agency—21 Pick. 515; or where an attorney obtained money, belonging to his client, by fraud and false pretenses, and retained a part for costs—41 Up. Can. Q. B. 545.

Obtaining goods by false pretenses.—Four things are necessary to constitute the offense: first, an intent to defraud; second, an act committed; third, a false pretense, and fourth, the fraud must be committed by the false pretense—19 Pick. 179. The fraud must be such as might deceive one of ordinary intelligence—11 Ind. 154; 33 Id. 484; 50 Id. 473; 58 Id. 98; 68 Id. 205; 4 Hill, 9; or a person of ordinary prudence and caution—50 Ind. 473; S. C. 1 Am. Cr. R. 218; see 14 Wend. 546; 11 Id. 557; so, a naked pretense, which ordinary care would avoid, is not sufficient—3 Met. (Ky.) 223; as where the pretenses were absurd or irrational—46 Me. 150; 3 Met. (Ky.) 223; 6 Baxt. (Tenn.) 222; 5 Clarke, (Pa.) 69; 7 Eng. 65; 2 Pa. L. J. 242; but see 22 Pa. St. 256. The perpetration of a fraud injurious to the person or estate of another, against which common prudence cannot guard, is cheating—3 Cranch C. C. 441; 1 Mc. 387; 7 Johns. 201; 11 Id. 371; 1 Bay, 282; 4 Hawks. 348; 1 Mass. 137; 2 Id. 139; 6 Id. 72; 108 Id. 309; 9 Cowen, 588; 9 Wend. 187; 1 Yerg. 76; 1 Rich. 244; 2 Va. Cas. 65; 11 Low. Can. J. 94; 2 Strange, 947.

The intent.—There must have been an intent to defraud—19 Pick. 179; 47 N. Y. 104; 30 Ala. 9; 28 Gratt. 912; 17 Hun, 535; 7 Allen, 548; and

actual defrauding is not necessary, if the intent be proved—Car. & M. 537. The intent must be to deprive the owner wholly of the property—Law R. 1 C. C. 761; as, if it deprives him only of possession it is theft—5 Tex. Ct. App. 122; 1 Port. 118; 19 Tex. 326. See *ante*, note under § 512. A subagent collecting money due the principal, knowing that it was the agent's intent to appropriate it, and not paying it over, is sufficient evidence of intent to defraud—21 Pick. 515. Intent is a question of fact—3 Hill, 169; 4 id. 9; 25 Wend. 399; 8 Hun, 623; 13 id. 575; 4 Denio, 525; 2 Parker Cr. R. 139; 17 Hun, 535; and is inferable from the guilty act deliberately performed—13 Wend. 87; 41 Miss. 579; 45 N. H. 186; 9 Adol. & E. 271; 8 Cox C. C. 411. Neither the ability nor the intention to repay will deprive the act of its criminality—97 Mass. 50; 115 id. 481; 35 N. J. 445; 105 Mass. 163; Law R. 1 C. C. 4; 10 Cox C. C. 140.

The act performed.—It is not necessary that the false pretense should be in words—10 Cox C. C. 44; id. 642; id. 648. Obtaining money or property by the use of a false token is sufficient—10 Cox C. C. 642; and a false business card is a false token—50 Ind. 473; see 9 Wend. 182; 13 id. 311; id. 87; 12 Johns. 291; 2 Dev. 199. Obtaining goods on a check knowing it would not be paid is within the statute—19 Pick. 179; or on a post-dated check falsely declared to be good—73 N. Y. 78; 12 Hun, 668; 8 Car. & P. 825; or on a check, when there were no funds in bank to meet it—47 N. Y. 303; 34 id. 351; 17 Hun, 218; see 3 Camp. 370; 1 Moody C. C. 224; 6 Term Rep. 565; or in which he had no account—47 N. Y. 303; 8 Phila. 609; 31 Ind. 192; 3 Camp. 370; 8 Car. & P. 825; 13 Cox C. C. 1. Obtaining money or goods on forged paper—12 Met. 446; 4 id. 43; 9 Gray, 125; 2 Humph. 37; 4 Cox C. C. 227; 10 id. 369; or on spurious notes or coin, is within the statute—2 Mass. 77; 12 Met. 446; 9 Gray, 125; 14 Cox C. C. 111; id. 115; but see 3 Car. & P. 420; 8 Cox C. C. 257; but whether so as to uncurrent bills depends on circumstances—4 Met. 43; but the offense is complete on passing a bill of a broken bank—4 Met. 43; Dears. & B. 442. Cheating by false devices is within the statute—2 Cranch C. C. 60; id. 83; 3 id. 441; 22 N. Y. 413; 1 Rich. 244; as by false dice—1 Dall. 335; 1 Up. Can. L. J. 179. So, selling by a false label—8 Cox C. C. 32; or by a false stamp on a gold watch—11 Cox C. C. 577; or by a false sample, is within the act—50 Ala. 454; 2 Car. & K. 630; Denison, 379; or by putting a false name on a picture and selling it as that of a pretended artist—4 Up. Can. L. J. 98; Dears. & B. 460.

False representations as to status.—Any false representation as to status is within the statute—19 Pick. 179; 5 Dutch. 13; 20 Wis. 217; 8 Cox C. C. 370; 13 id. 608; see 2 Humph. 37; as infancy, coverture, etc., or being invested with certain rights—4 Cox C. C. 277; as a minor pretending to be of full age—2 Whart. C. L. 8th ed. § 1149; or a married woman pretending to be unmarried, or *e converso*—Car. & M. 517; 11 Cox C. C. 187; 9 id. 158; Sayers, 229.

Pretense of wealth.—Any designed misstatements of his condition, by which money or goods is obtained, is within the statute—65 N. C. 231; as a pretense of wealth, credit, or solvency—1 Wheel. C. C. 449; 11 Wend. 563; 25 id. 399; 56 Ind. 245; 63 id. 98; but see 10 Vt. 587; or ownership of specific assets to obtain credit—2 Pa. St. 163; 13 Wend. 87; 106 Mass. 309; or negotiable paper—1 Mo. 177; or indorsements—13 Wend. 87. So a representation that he had capital—6 Pa. L. J. 272; see 27 Conn. 587; 26 Iowa, 450; 30 Ind. 350; 78 N. C. 460; or is out of debt—17 Hun, 306; or any false statement as to ownership of property—25 Wend. 399; 33 Me. 498; or that he is in a situation in which he was not, or any occurrence that had not happened—1 Cold. 333; as that he was engaged in business, and resided in a particular place—2 Wheel. C. C. 161; or as to his possession of money—2 Pa. St. 163; or even that he is insolvent, thereby inducing a creditor to discount his claim—5 Dutch. 13. So obtaining money on a chattel mortgage on property he falsely claims to own—11 Ala. 233; 1 Mo. 248; or making a false statement as to

validity of a mortgage—10 Cox C. C. 577; Car. & M. 249; 7 Cox C. C. 126, 131; but see id. 312; 8 id. 233; or that certain land is unincumbered—33 Me. 498; or that a particular mortgage is a first lien—5 Parker Cr. R. 142. Exhibiting letter-heads, business cards, or drafts making a note payable at a certain bank, and drawing an order for money, are false representations of solvency—81 Ill. 98.

Operative cause.—The false pretense must be the operative cause of the transfer—1 Cush. 33; 7 Allen, 549; 104 Mass. 549; 114 id. 325; 1 Mo. 243; 5 Dutch. 14; 58 Ind. 98; 2 Parker Cr. R. 197; 7 Car. & P. 352; 5 Up. Can. L. J. N. S. 21; 11 Cox C. C. 85; 14 Up. Can. C. P. 529; 26 Up. Can. Q. B. 312; id. 13; 9 Ad. & E. 271; 7 Cox C. C. 138. The obtaining of the property must not be too remotely connected with the false pretense—2 Up. Can. L. J. 139; Dears. & B. 40; Law R. 1 C. C. 56. But the false pretense need not be the exclusive motive—17 Kan. 542; S. C. 2 Am. Cr. R. 239; if it is a part of the moving cause it is sufficient—62 Barb. 62; 17 Kan. 542; S. C. 2 Am. Cr. R. 239; 14 Wend. 547; if it had a preponderating influence—115 Mass. 481; 13 Wend. 87; 14 id. 547; 34 N. Y. 354; 4 Barb. 151; 28 Gratt. 912; 55 Miss. 513; 41 id. 570; 17 Me. 211; 24 id. 77; 35 N. J. L. 445; and a concurrent promise will not neutralize it—12 Conn. 101; 6 Cox C. C. 467; 7 id. 394; 8 id. 12; 9 id. 158; 7 Car. & P. 191; 2 Moody C. C. 234. The preponderation of the influence must be proved—2 Parker Cr. R. 197.

533. Every person who, after once selling, bartering, or disposing of any tract of land or town lot, or, after executing any bond or agreement for the sale of any land or town lot, again willfully and with intent to defraud previous or subsequent purchasers, sells, barter, or disposes of the same tract of land or town lot, or any part thereof, or willfully and with intent to defraud previous or subsequent purchasers, executes any bond or agreement to sell, barter, or dispose of the same land or lot, or any part thereof, to any other person for a valuable consideration, is punishable by imprisonment in the State prison not less than one nor more than ten years.

Selling land twice.—Under the statute, selling land twice is an indictable offense—35 Cal. 470; except where the second grantee is informed by the grantor of the terms of the first sale—id.; but giving a mortgage on lands sold is not disposing of the land, within the statute—45 Cal. 342.

534. Every married person who falsely and fraudulently represents himself or herself as competent to sell or mortgage any real estate, to the validity of which sale or mortgage the assent or concurrence of his wife or her husband is necessary, and under such representations willfully conveys or mortgages the same, is guilty of felony.

535. Every person who obtains any money or property from another, or obtains the signature of another to any written instrument, the false making of which would be forgery, by means of any false or fraudulent sale of property or pretended property, by auction, or by any of the practices known as mock auctions, is punishable by imprisonment in the State prison not exceeding three years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and, in addition thereto, forfeits any license he may hold as auctioneer, and is forever disqualified from receiving a license to act as auctioneer within this State.

See Pol. Code, § 3284.

536. Every commission merchant, broker, agent, factor, or consignee, who shall willfully and corruptly make, or cause to be made, to the principal or consignor of such commission merchant, agent, broker, factor, or consignee, a false statement concerning the price obtained for, or the quality or quantity of any property consigned or intrusted to such commission merchant, agent, broker, factor, or consignee, for sale, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or by both such fine and imprisonment. [In effect April 15th, 1880.]

CHAPTER IX.

FRAUDULENTLY FITTING OUT AND DESTROYING VESSELS.

§ 539. Captain or other officer willfully destroying vessel, etc.

§ 540. Other person willfully destroying vessel, etc.

§ 541. Making false manifest, etc.

539. Every captain or other officer or person in command or charge of any vessel, who, within this State, willfully wrecks, sinks, or otherwise injures or destroys such vessel, or any cargo in such vessel, or willfully permits the same to be wrecked, sunk, or otherwise injured or destroyed, with intent to prejudice or defraud any other person, is punishable by imprisonment in the State prison not less than three years.

See 1 Wash. C. C. 363; and see Acts of Congress, Bright. Dig. pp. 209-211.

Destroy means to unfit a vessel for service beyond hope of recovery by ordinary means—4 Dall. 412; S. C. 1 Wash. C. C. 363. The intent to defraud is material—6 McLean, 274. See generally, 11 Wheat. 392; 5 McLean, 513; 1 Law Reporter N. S. 151; 3 Wash. C. C. 146; see Rev. Stat. U. S. §§ 5364-6.

540. Every person, other than such as are embraced within the last section, who is guilty of any act therein specified, is punishable by imprisonment in the State prison for a term not exceeding ten years.

541. Every person guilty of preparing, making, or subscribing any false or fraudulent manifest, invoice, bill of lading, ship's register, or protest, with intent to defraud another, is punishable by imprisonment in the State prison not exceeding three years.

CHAPTER X.

FRAUDULENTLY KEEPING POSSESSION OF WRECKED
PROPERTY.

§ 544. Detaining wrecked property after salvage paid.

§ 545. Unlawful taking of wrecked property.

544. Every person who keeps any wrecked property, or the proceeds thereof, after the salvage and expenses chargeable thereon have been agreed to or adjusted, and the amount thereof has been paid to him, is punishable by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year, or both.

See Pol. Code, §§ 2403-2418.

545. Every person who takes away any goods from any stranded vessel, or any goods cast by the sea upon the land, or found in any bay or creek, or knowingly has in his possession any goods so taken or found, and does not deliver the same to the sheriff of the county where they were found, or notify him of his readiness to do so, within thirty days after the same have been taken by him, or have come into his possession, is guilty of a misdemeanor.

See Pol. Code, §§ 2403-2418.

CHAPTER XI.

FRAUDULENT DESTRUCTION OF PROPERTY INSURED.

§ 548. Burning or destroying property insured.

§ 549. Presenting false proofs upon policy of insurance.

548. Every person who willfully burns or in any other manner injures or destroys any property which is at the time insured against loss or damage by fire, or by any other casualty, with intent to defraud or prejudice the insurer, whether the same be the property of or in possession of such person, or of any other, is punishable by imprisonment in the State prison not less than one nor more than ten years.

See *ante*, notes to §§ 447, 452; and see Civ. Code, §§ 2527, 2531.

Burning to defraud insurers—is an indictable offense under the statute—32 Cal. 160; 19 N. Y. 537; 51 N. H. 176; 1 Parker Cr. R. 560; and a possibility of defrauding is sufficient—63 Me. 128; 25 Mich. 500; 1 Esp. 127; Dears. 187. The intent to defraud must be averred, and the parties accurately set out—82 Ill. 432; 63 Id. 451. Though there are several insurers, it is but a single crime—114 Mass. 272.

549. Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes, or subscribes any account, certificate of survey, affidavit, or proof of loss, or other book, paper, or writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim, is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both.

See *ante*, notes to §§ 447, 452; and see Civ. Code, §§ 2633-2637.

False proofs.—To swear falsely to the loss, by fire, of goods which have been insured, and thereby getting the insurance, is within the statute—1 Wheel. C. C. 242.

CHAPTER XII.

FALSE WEIGHTS AND MEASURES.

- § 552. "False weight" and "measure" defined.
§ 553. Using false weights or measures.
§ 554. Stamping false weight, etc., on casks or packages.
§ 555. Weight by the ton or pound.

552. A false weight or measure is one which does not conform to the standard established by the laws of the United States of America.

See Pol. Code, §§ 3209-3223.

553. Every person who uses any weight or measure, knowing it to be false, by which use another is defrauded or otherwise injured, is guilty of a misdemeanor.

Use of false weights.—The use of false weights and measures on the sale of property is cheating—6 Mass. 72; 12 Johns. 291; 9 Wend. 182; 13 Id. 311; Id. 87; 3 Burr. 1697; 1 Black. W. 273; 3 Term Rep. 104. Falsely representing the weight of an article is within the statute—3 Cox C. C. 263; Id. 262; but not if only done to induce to a purchase—3 Fost. & F. 838; see 9 Cox C. C. 460; so to pretend to have weighed it, and falsely representing its weight, is a false pretense—3 Fost. & F. 838.

554. Every person who knowingly marks or stamps false or short weight or measure, or false tare, on any cask or package, or knowingly sells or offers for sale, any cask or package so marked, is guilty of a misdemeanor.

Marks and stamps.—A baker marking bread at overweight is guilty of cheating—1 Dall. 47; but not if no weights be used—Id.; 3 Const. S. C. 139; so, selling an article with a forged seal on it—2 Russ. Cr. 609; or a false stamp or trade-mark—2 East P. C. 820.

555. In all sales of coal, hay, and other commodities, usually sold by the ton or fractional parts thereof, the seller must give to the purchaser full weight, at the rate of two thousand pounds to the ton; and in all sales of articles which are sold in commerce by avoirdupois weight, the seller must give to the purchaser full weight, at the rate of sixteen ounces to the pound; and any person violating this section is guilty of a misdemeanor. [Approved Feb. 15th, 1876.]

CHAPTER XIII.

FRAUDULENT INSOLVENCIES BY CORPORATIONS, AND OTHER
FRAUDS IN THEIR MANAGEMENT.

- § 557. Frauds in subscriptions for stock of corporations.
- § 558. Frauds in procuring organization, etc., of corporation.
- § 559. Unauthorized use of names in prospectus, etc.
- § 560. Misconduct of directors of stock corporations.
- § 561. Savings-bank officer overdrawing his account.
- § 562. Receiving deposits in insolvent banks.
- § 563. Frauds in keeping accounts in books of corporations.
- § 564. Officer of corporation publishing false reports.
- § 565. Officer of corporation to permit an inspection.
- § 566. Officer of railroad company contracting debt in its behalf exceeding its available means.
- § 567. Debt contracted in violation of last section not invalid.
- § 568. Director of a corporation presumed to have knowledge of its affairs.
- § 569. Director present at meeting, when presumed to have assented to proceedings.
- § 570. Director absent from meeting, when presumed to have assented to proceedings.
- § 571. Foreign corporations.
- § 572. "Director" defined.

557. Every person who signs the name of a fictitious person to any subscription for or agreement to take stock in any corporation existing or proposed, and every person who signs to any subscription or agreement the name of any person, knowing that such person has not means or does not intend in good faith to comply with all the terms thereof, or under any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor.

The obligation of actual payment is created in all cases by a subscription to a capital stock, unless the terms of the subscription plainly exclude it—3 Sand. 164; 2 Hill, 133; 5 Id. 478; 1 Sand. Ch. 180; 7 Mc. 392; 21 Wend. 273; 12 Conn. 499. See Civ. Code, §§ 292, 293, 295.

558. Every officer, agent, or clerk of any corporation, or of any persons proposing to organize a corporation, or to increase the capital stock of any corporation, who knowingly exhibits any false, forged, or altered book, paper, voucher, security, or other instrument of evidence, to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to be allowed an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in the State prison not less than three nor more than ten years.

See Civ. Code, §§ 283-320, 322-349, 359, 377, 378. See 3 Sand. 164.

559. Every person who, without being authorized so to do, subscribes the name of another to or inserts the name of another in any prospectus, circular, or other advertisement or announcement of any corporation or joint-stock association, existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member, or promoter of such corporation or association, is guilty of a misdemeanor.

See Civ. Code, §§ 292, 293; and see *ante*, § 558.

560. Every director of any stock corporation who concurs in any vote or act of the directors of such corporation or any of them, by which it is intended, either—

1. To make any dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw, or in any manner, except as provided by law, pay to the stockholders, or any of them, any part of the capital stock of the corporation; or,

3. To discount or receive any note or other evidence of debt in payment of any installment actually called in and required to be paid, or with the intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt, with the intent to enable any stockholder to with-

draw any part of the money paid in by him, or his stock; or,

5. To receive from any other stock corporation, in exchange for the shares, notes, bonds, or other evidences of debt of their own corporation, shares of the capital stock of such other corporation, or notes, bonds, or other evidences of debt issued by such other corporation;

—is guilty of a misdemeanor.

See Civ. Code, "Corporations"; and see *ante*, §§ 309, 558.

561. Every officer, agent, teller, or clerk of any savings-bank, who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, note, or funds of such bank, is guilty of a misdemeanor.

Overdrawing account—by bank director or officer of a bank, is indictable—4 Zab. 478.

562. Every officer, agent, teller, or clerk of any bank, and every individual banker, or agent, teller, or clerk of any individual banker, who receives any deposits, knowing that such bank, or association, or banker is insolvent, is guilty of a misdemeanor.

See 4 Zab. 478.

563. Every director, officer, or agent of any corporation or joint-stock association, who knowingly receives or possesses himself of any property of such corporation or association, otherwise than in payment of a just demand, and who, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books or accounts of such corporation or association, and every director, officer, agent, or member of any corporation or joint-stock association who, with intent to defraud, destroys, alters, mutilates, or falsifies any of the books, papers, writings, or securities belonging to such corporation or association, or makes, or concurs in making, any false entries, or omits, or concurs in omitting to make any material entry in any book of accounts, or other record or document kept by such corporation or association, is punishable by imprisonment in the State prison

not less than three nor more than ten years, or by imprisonment in a county jail not exceeding one year, and a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

See *ante*, § 558.

Agent of corporation.—An indictment lies against an agent of a corporation for making false entries in the corporate books—53 Cal. 615. See *post*, § 950.

564. Every director, officer, or agent of any corporation or joint-stock association, who knowingly concurs in making, publishing, or posting any written report, exhibit, or statement of its affairs or pecuniary condition, or book or notice containing any material statement which is false, or refuses to make any book or post any notice required by law, in the manner required by law, other than such as are mentioned in this chapter, is guilty of a felony. [Approved January 27th, 1876.]

See Civ. Code, § 316. This section defines several distinct offenses—53 Cal. 648; see 6 Abb. Pr. 247; 11 id. 234.

565. Every officer or agent of any corporation, having or keeping an office within this State, who has in his custody or control any book, paper, or document of such corporation, and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or of any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor.

See Civ. Code, §§ 377, 378, 382, 383. Books to be kept open for inspection—5 N. Y. 562. The statute gives the stockholder not only the right to inspect the books but to take copies of the same—1 Seld. 562.

566. Every officer, agent, or stockholder of any railroad company, who knowingly assents to, or has any agency in contracting any debt by or on behalf of such company, unauthorized by a special law for the purpose, the amount of which debt, with other debts of the company, exceeds its available means for the payment of its debts, in its possession, under its control, and belonging to it at the time such debt is contracted, including its *bona fide* and available stock subscriptions, and exclusive of its real estate, is guilty of a misdemeanor.

Offenses defined.—This section defines two or more offenses—one being a concurrence by an officer of a corporation in making a false statement, and the other a concurrence in its publication—53 Cal. 647. See Civ. Code, §§ 309, 456, 457.

567. The last section does not affect the validity of a debt created in violation of its provisions, as against the company.

568. Every director of a corporation or joint-stock association is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding, or omission of its directors is a violation of this chapter.

569. Every director of a corporation or joint-stock association, who is present at a meeting of the directors at which any act, proceeding, or omission of such directors, in violation of this chapter, occurs, is deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors.

See Civ. Code, §§ 309, 317, 377.

570. Every director of a corporation or joint-stock association, although not present at a meeting of the directors at which any act, proceeding, or omission of such directors, in violation of this chapter, occurs, is deemed to have concurred therein, if the facts constituting such violation appear on the records or minutes of the proceedings of the board of directors, and he remains a director of the same company for six months thereafter, and does not within that time cause, or in writing require, his dissent from such illegality to be entered in the minutes of the directors.

571. It is no defense to a prosecution for a violation of the provisions of this chapter, that the corporation was one created by the laws of another State, government, or country, if it was one carrying on business or keeping an office therefor within this State.

572. The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter or known by law.

PEN. CODE.—21.

CHAPTER XIV.

FRAUDULENT ISSUE OF DOCUMENTS OF TITLE TO MERCHANDISE.

- § 577. Issuing fictitious bills of lading, etc.
- § 578. Issuing fictitious warehouse receipts.
- § 579. Erroneous bills of lading or receipts issued in good faith.
- § 580. Duplicate receipts must be marked "duplicate."
- § 581. Selling, etc., property received for transportation or storage.
- § 582. Bill of lading or receipt issued by warehouseman.
- § 583. Property demanded by process of law.

577. Every person, being the master, owner, or agent of any vessel, or officer or agent of any railroad, express, or transportation company, or otherwise being or representing any carrier, who delivers any bill of lading, receipt, or other voucher, by which it appears that any merchandise of any description has been shipped on board any vessel, or delivered to any railroad, express, or transportation company, or other carrier, unless the same has been so shipped or delivered, and is at the time actually under the control of such carrier, or the master, owner, or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt, or voucher, is punishable by imprisonment in the State prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

Bill of lading—see Civ. Code, § 2126; Desty's Ship. & Adm. § 217.

578. Every person carrying on the business of a warehouseman, wharfinger, or other depositary of property, who issues any receipt, bill of lading, or other voucher for any merchandise of any description, which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such merchandise, or as security for any indebtedness, is punishable by imprison-

ment in the State prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

See Civ. Code, § 1814.

579. No person can be convicted of an offense under the last two sections by reason that the contents of any barrel, box, case, cask, or other vessel or package mentioned in the bill of lading, receipt, or other voucher, did not correspond with the description given in such instrument of the merchandise received, if such description corresponded substantially with the marks, labels, or brands upon the outside of such vessel, or package, unless it appears that the accused knew that such marks, labels, or brands were untrue.

See Civ. Code, § 1817.

580. Every person mentioned in this chapter, who issues any second or duplicate receipt or voucher, of a kind specified therein, at a time while any former receipt or voucher for the merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word "duplicate," in a plain and legible manner, is punishable by imprisonment in the State prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both

See Civ. Code, § 2130.

581. Every person mentioned in this chapter, who sells, hypothecates, or pledges any merchandise for which any bill of lading, receipt, or voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt, or voucher, is punishable by imprisonment in the State prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

See Pol. Code, §§ 3152-3157.

582 of said Code is repealed. [Approved March 30th., in effect July 1st, 1874.

See Civ. Code, §§ 2127, 2128.

583. The last two sections do not apply where property is demanded or sold by virtue of process of law.

CHAPTER XV.

MALICIOUS INJURIES TO RAILROAD BRIDGES, HIGHWAYS, BRIDGES, AND TELEGRAPHS.

- § 587. Injuries to railroads and railroad bridges.
- § 588. Injuries to highways, private ways, and bridges.
- § 589. Injuries to toll-houses and gates.
- § 590. Injuries to milestones and guide-boards.
- § 591. Injuring telegraph lines.
- § 592. Taking water from or obstructing canals.

587. Every person who maliciously, either—

1. Removes, displaces, injures, or destroys any part of any railroad, whether for steam or horse cars, or any track of any railroad, or any branch or branch-way, switch, turnout, bridge, viaduct, culvert, embankment, station-house, or other structure or fixture, or any part thereof, attached to or connected with any railroad; or,

2. Places any obstruction upon the rails or track of any railroad, or of any switch, branch, branch-way, or turnout connected with any railroad;

—is punishable by imprisonment in the State prison not exceeding five years, or in the county jail not less than six months.

Injuries to railroads.—Willfully placing an obstruction on a railroad track is within this section—59 Ala. 98; and the obstruction must be such as to endanger life—7 Tex. Ct. App. 462; and that the defendant was impelled by other motives than to injure the train, is no defense—2 Moody & R. 339; nor is it a defense, if the intent to endanger the safety of passengers is proved, that the train was a freight train—1 Fost. & F. 37; but see 6 Cox C. C. 202. Willfully throwing anything upon a train, so as to endanger the safety of passengers, is an indictable offense—10 Jur. 211; but if the intent was only to commit an assault on a person on the train, the case is not sustained—1 Fost. & F. 107. Obstructions or injuries, as changing the signals so as to slow the train—Law R. 1 C. C. 253; or stretching out the arms as a signal—*id.* 278; or maliciously placing stones on the track, with intent to injure any car, is indictable—5 Cox C. C. 298.

588. Every person who maliciously digs up, removes, displaces, breaks, or otherwise injures or destroys any

public highway or bridge, or any private way laid out by authority of law, or bridge upon such highway or private way, is punishable by imprisonment in the State prison not exceeding five years, or in the county jail not exceeding one year.

589. Every person who maliciously injures or destroys any toll-house or turnpike gate, is guilty of a misdemeanor.

590. Every person who maliciously removes or injures any mile-board, post, or stone, or guide-post, or any inscription on such, erected upon any highway, is guilty of misdemeanor.

591. Every person who maliciously takes down, removes, injures, or obstructs any line of telegraph, or any part thereof, or appurtenance or apparatus connected therewith, or severs any wire thereof, is guilty of a misdemeanor.

592. Every person who shall without authority of the owner or managing agent, and with intent to defraud, take water from any canal, ditch, flume, or reservoir, used for the purpose of holding or conveying water for manufacturing, agricultural, mining, or domestic uses, or who shall, without like authority, raise, lower, or otherwise disturb any gate or other appurtenance thereof used for the control or measurement of water, or who shall empty or place, or cause to be emptied or placed into any such canal, ditch, flume, or reservoir, any rubbish, filth, or obstruction to the free flow of the water, is guilty of a misdemeanor. [Approved April 1st, 1878.]

TITLE XIV.

Malicious Mischief.

- § 594. Malicious mischief in general, defined.
- § 595. Specifications in following sections not restrictive of last section.
- § 596. Poisoning cattle.
- § 597. Killing, maiming, or torturing animals.
- § 598. Killing, etc., birds in cemeteries.
- § 599. Killing seals. [Repealed.]
- § 600. Burning buildings, etc., not the subject of arson.
- § 601. Using gunpowder, etc., in destroying or injuring any buildings.
- § 602. Malicious injuries to freehold.
- § 603. Limitation upon the operations of the preceding section.
- § 604. Injuries to standing crops, etc.
- § 605. Removing, defacing, or altering landmarks.
- § 606. Destroying or injuring jails.
- § 607. Destroying or injuring bridges, dams, etc.
- § 608. Burning or injuring rafts. Setting adrift vessels.
- § 609. Removing buoys and beacons.
- § 610. Masking or removing signals, or exhibiting false lights.
- § 611. Obstructing navigable streams.
- § 612. Depositing sand, dust, etc., in Humboldt Bay.
- § 613. Throwing overboard ballast, or obstructing navigation.
- § 614. Mooring vessels to buoys.
- § 615. Injuries to signals, etc., in United States survey.
- § 616. Destroying or tearing down notices, etc.
- § 617. Injuring or destroying written instrument.
- § 618. Opening or publishing sealed letters.
- § 619. Disclosing contents of telegraphic message.
- § 620. Altering telegraphic messages.
- § 621. Opening telegrams.
- § 622. Injuring works of art or improvements.
- § 623. Destroying works of literature, etc., in public libraries.
- § 624. Breaking or obstructing water-pipes, etc.
- § 625. Drawing water from works after they have been closed.

594. Every person who maliciously injures or destroy any real or personal property not his own, in cases otherwise than such as are specified in this Code, is guilty of a misdemeanor.

Malicious mischief.—Malicious mischief is the willful injury or destruction of personal property, from ill-will or resentment toward its owner, or out of a spirit of wanton cruelty or revenge—3 Dev. & B. 130; 110 Mass. 401; 3 Cush. 558. The essence of the offense is injury to property—3 Parker Cr. R. 185; 26 Ohio St. 265; whether the possession to the property was rightful or wrongful—7 Barb. 9; 8 Humph. 37; 52 Ind. 478; 14 Kan. 296; 33 Me. 361; or, though the title to the property be in dispute between the parties—4 Moody & R. 431; but see 52 Ind. 478; and ownership need not be averred—101 Mass. 84; 32 Tex. 611; and see 43 Id. 433; but an honest belief in title is a defense—14 Kan. 296; 62 Ind. 437; 14 Cox C. C. 5; especially where the trespass is the removal of fences—45 Ind. 388. So, consent of the owner is a defense—21 Me. 341; 11 Tex. 368. The injury must be such as to impair utility—2 Met. 21. At common law, the act of injury must be done with a breach of the peace—3 Vt. 344; 3 Tex. 312; 10 Ired. 17; or to the scandal of the public—2 Cranch C. C. 259; 4 Id. 483; or be marked by a malignant cruelty—52 Ind. 478.

Must be willful.—Neither negligent injury, nor injury inflicted in hot blood will constitute the offense—3 Cush. 558; 3 Dev. & B. 130; 52 Ind. 478; 10 Iowa, 115; 1 Minn. 292; 51 Miss. 353; 12 Cox C. C. 607; the act must be willfully and maliciously done—1 Up. Can. Q. B. 155.

The malice.—Malice is the *gravamen* of the offense, without which it would be mere trespass—43 Ala. 330; 44 Id. 380; 72 N. C. 201; 3 Dutch. 124; 49 Miss. 331; 51 Id. 353; but see 37 Ala. 457; 28 Ga. 190. There must be malice toward the owner or possessor of the property—7 Ala. 728; 41 Id. 330; 44 Id. 380; 30 Ga. 325; 13 Ired. 33; 10 Iowa, 115; 49 Miss. 331; 61 N. C. 23; 79 Id. 656; 41 Tex. 622; 3 Yerg. 278; 3 Heisk. 457; but see 1 Tenn. 305; 26 Ohio St. 176; 1 Car. & K. 705; but it need not be express malice, nor need any general bad purpose or design be entertained—15 Pick. 337; 9 Met. 410. A malicious injury is an injury committed willfully and wantonly and without cause or excuse—34 Cal. 48; 36 Id. 253; 3 Story, 7; 1 Sum. 394; 2 Id. 586; 3 Mason, 102; 4 Id. 115; 5 Id. 192; 21 Mo. 287; 122 Mass. 19; 12 Tex. 462; 25 Id. 33. So, malignant cruelty irrespective of special malice is sufficient, if it shock or scandalize the community—4 Cranch C. C. 483; 23 Ga. 190; 26 Ohio St. 176; or if the act be done with the spirit of wanton cruelty or wicked revenge—3 Cush. 558; 44 Ala. 381. See 5 Parker Cr. R. 568; 64 N. C. 23; 43 Ala. 330. It is a question of fact—3 How. 292; 4 Barn. & C. 247; see 24 How. 552; and may be inferred from facts and circumstances—43 Ala. 335; 44 Id. 381; 42 Ind. 354; 3 Yerg. 278; 13 Cox C. C. 121; as secretly committing the act in the night-time, or where the injury was peculiarly wanton—5 Parker Cr. R. 568; 64 N. C. 23; 43 Ala. 330. It will be inferred from an unlawful act—5 Allen, 2; or from the instrument used—43 Ala. 335; or it may be negatived by proof of a friendly purpose—4 Car. & P. 363; or necessity—30 Ga. 325; 6 Jones, (N. C.) 276; 3 Cox C. C. 505. If the injury be not wanton, or done under belief of a right, without malice, it is not malicious mischief—3 Dev. & B. 130; 43 Ala. 335; 44 Id. 381; 8 Humph. 37; 10 Iowa, 115; 64 N. C. 23; 3 Yerg. 276.

Offense generally.—It is malicious mischief to do any act which will sustain an indictment for arson—32 Me. 183; so, setting fire to barrels of tar belonging to another constitutes the offense—2 Hawks, 460; so, knowingly meddling with a fire-alarm box—2 Met. 21; or cutting a rope attached to a banner—17 N. H. 543; or cutting off a few feet of cable—2 Met. 21; or tearing up notes—1 Dall. 338; or discharging a gun to annoy a sick person—9 Pick. 1; or indecently breaking into a room for the same purpose—5 Binn. 277; 15 Pa. St. 95; or putting irritating substances on a towel, and in a tub used by others—1 Wheel. C. C. 430; or cantharides in rum, is malicious mischief—2 Car. & K. 912; 1 Cox C. C. 282; 2 Moody & R. 531; but willfully and maliciously destroying the saddle-bags of a traveler—6 Humph. 283; or tearing down corn—5 Ired. 364; or pulling up cabbages, has been held not malicious mischief—6 Gray, 349.

595. The specification of the acts enumerated in the following sections of this chapter is not intended to restrict or qualify the interpretation of the preceding section.

596. Every person who willfully administers any poison to an animal, the property of another, or maliciously exposes any poisonous substance, with the intent that the same shall be taken or swallowed by any such animal, is punishable by imprisonment in the State prison not exceeding three years, or in the county jail not exceeding one year, and a fine not exceeding five hundred dollars.

Hens.—Though hens are not beasts, yet poisoning them is indictable—108 Mass. 304; 1 Dall. 338.

597. Every person who maliciously kills, maims, or wounds an animal, the property of another, or who maliciously and cruelly beats, tortures or injures any animal, whether belonging to himself or another, is guilty of a misdemeanor.

Cruelty to animals.—A public and scandalous cruelty to animals is an indictable offense distinct from malicious injury to animals—5 Rand. 680, whether inflicted by the owner or another—7 Allen, 579; 2 Cranch C. C. 253; 4 Id. 483; 44 N. H. 392; 23 Ga. 190; 1 Aiken, 226; 7 Law Reporter N. S. 89. It has been made a statutory offense, 7 Allen, 570; 49 How. Pr. 435; 101 Mass. 34; 113 Id. 458; 22 Minn. 271; see 111 Mass. 406; 4 Hun, 441; 16 Abb. Pr. N. S. 73. Wanton cruelty to animals, whether his own or those of another, is indictable at common law—2 Cranch C. C. 259; 1 Aiken, 226; 7 Law Reporter N. S. 89; 4 Cranch C. C. 483; 44 N. H. 392; 28 Ga. 190. See Pol. Code, § 19, subd. 8.

Malicious mischief.—A malicious injury to any beast, which may be the property of another, is indictable—8 Gratt. 708; 3 Vt. 344; 19 Wend. 419; but see 3 Tex. 316; 5 Dana, 277; as, for maliciously driving cattle from their range, 43 Tex. 467; 4 Tex. Ct. App. 549. Cattle includes asses—1 Moody C. C. 3; cows—5 Cowen, 258; 1 Mass. 58; 1 D. II. 335; geldings—1 Leach, 73; pigs—4 Leigh, 686; 49 Miss. 331; Russ. & R. C. C. 77; steers—2 Dev. & B. 35; 20 Vt. 537; hogs—10 Iowa, 115; 21 Wall, 300; 1 Leach, 73; and horses, mares, and colts—1 Dall. 335; 5 Cowen, 258; 20 Vt. 337; 22 Mo. 452; 1 Leach, 72; 2 East P. C. 1076. Tame buffaloes are not cattle—22 Mo. 457.

Malicious injury to animals.—A malicious injury to animals is indictable—4 Cranch C. C. 483; 28 Ga. 190; 26 Ohio St. 176; 8 Met. 222; 5 Denio, 277; 44 N. H. 392. Maiming or wounding an animal without killing it has been held not indictable at common law—3 Dutch. 124; 73 N. C. 201; 2 East P. C. 1074; *contra*, 1 Wheel. C. C. 111; but it is an offense at common law to shoot or wound stock found trespassing on one's premises—19 Ill. 80. It is a distinct offense from the willful and wanton killing of animals—7 Tex. Ct. App. 78; id. 5. That the cattle were trespassing is no defense—19 Ill. 80; but the malice may be negatived by showing that the trespassing animal was vicious and danger-

ous to drive out—19 Ill. 80; 30 Ga. 325; 6 Jones (N. C.) 276; 3 Cox C. C. 503. In maliciously wounding a horse it is not necessary to prove the use of an instrument—11 Cox C. C. 125; a permanent injury must be inflicted—1 Car. & K. 539; so, pouring acid into the eyes of a mare and blinding her is indictable—1 Moody C. C. 205. The willful disfigurement or maiming a horse is indictable—8 Bush, 1; S. C. 1 Green C. R. 293. The word wound must be taken in its ordinary sense—Law R. 1 C. C. 115. Shaving the mane and cropping the tail was held not a disfigurement—Cheves S. C. 157; *contra*, 2 Humph. 39; but driving a nail into the frog of a horse's hoof is a maiming, even if curable—Russ. & B. 16.

Malicious killing.—It is indictable to maliciously and willfully kill animals of another, with intent to injure him—3 Tex. Ct. App. 31; 8 Bush, 1; S. C. 1 Green C. R. 293; or to wantonly kill an animal where the effect is to disturb and molest a family—9 Gratt. 708. To destroy the horse of another is an indictable offense—1 Dall. 335; 1 Tenn. 305; but see 6 Humph. 283; *id.* 285. Killing a horse with malice toward the bailee constitutes the offense, though there be no malice toward the owner—3 Helsk. 262; S. C. 1 Green C. R. 521. So, killing hogs in defendant's crop, if the fence is not hog-proof, is an offense—3 Tex. Ct. App. 228. Dogs are protected—13 Ired. 33; 2 Ind. 377; 34 N. H. 523; but not in Virginia—17 Gratt. 617. As to South Carolina, the question is still in doubt—14 Rich. 203; but going to a porch and shooting a dog, to the terror of the people, is indictable—8 Gratt. 708. What a dog has previously done is no defense for wantonly killing him, when not in *flagrante delictu*—5 Tex. Ct. App. 475.

598. Every person who, within any public cemetery or burying-ground, kills, wounds, or traps any bird, or destroys any bird's nest other than swallows' nests, or removes any eggs or young birds from any nest, is guilty of a misdemeanor.

599. That section five hundred and ninety-nine of the Penal Code is hereby repealed. [In effect March 12th, 1880.]

600. Every person who willfully and maliciously burns any bridge exceeding in value fifty dollars, or any building, snow-shed, or vessel, not the subject of arson, or any stack of grain of any kind, or of hay, or any growing or standing grain, grass, or tree, or any fence, not the property of such person, is punishable by imprisonment in the State prison for not less than one nor more than ten years.

Burning.—Where a landlord burned shocks of corn on the land after the expiration of the lease, it was held malicious mischief—81 Ill. 478. Destroying any barrack, cock, crib, rick, or stack, is malicious mischief—76 Ill. 274; so, of setting fire to barrels of tar belonging to another person—2 Hawks, 46.

601. Every person who maliciously, by the explosion of gunpowder or other explosive substance, destroys,

throws down, or injures the whole or any part of any building, by means of which the life or safety of a human being is endangered, is guilty of felony.

602. Every person who willfully commits any trespass by either—

1. Cutting down, destroying, or injuring any kind of wood or timber standing or growing upon the lands of another; or,

2. Carrying away any kind of wood or timber lying on such lands; or,

3. Maliciously injuring or severing from the freehold of another anything attached thereto, or the produce thereof; or,

4. Digging, taking, or carrying away from any lot situated within the limits of any incorporated city, without the license of the owner or legal occupant thereof, any earth, soil, or stone; or

5. Digging, taking, or carrying away from any land in any of the cities of the State, laid down on the map or plan of such city, or otherwise recognized or established as a street, alley, avenue, or park, without the license of the proper authorities, any earth, soil, or stone; or,

6. Putting up, affixing, fastening, printing, or painting upon any property belonging to the State, or to any city, county, town, or village, or dedicated to the public, or upon any property of any person, without license from the owner, any notice, advertisement, or designation of, or any name for any commodity, whether for sale or otherwise, or any picture, sign, or device intended to call attention thereto; or,

7. Entering upon any lands owned by any other person or persons whereon oysters or other shell-fish are planted or growing; or injuring, gathering, or carrying away any oysters or other shell-fish planted, growing, or being on any such lands, whether covered by water or not, without the license of the owner or legal occupant thereof; or destroying or removing, or causing to be re-

moved or destroyed, any stakes, marks, fences, or signs intended to designate the boundaries and limits of any such lands;

—is guilty of a misdemeanor. [In effect March 30th, 1878.]

Malicious injury to a freehold.—Real estate, as well as personal property, is protected; so, it is indictable to tear down the roof and chimney of a house, in the peaceable possession of another—3 Mo. 125; or to unlawfully pull down a building—5 Allen, 2. In mischief to buildings, a malicious intent is essential—110 Mass. 401. The wanton destruction of property in the day-time, clandestinely and maliciously, is a misdemeanor—5 Parker Cr. R. 568. Stripping copper pipes or sheeting from a house constitutes the offense—Kelyng, 29. Where a traveler, refusing to pay toll, sawed down the toll-gate and passed through, it was malicious mischief—50 Ind. 281. Breaking windows of a house—1 Dall. 338; or breaking glass in the building, constitutes the offense—11 Cush. 414; S. C. 2 Lead. C. C. 172. A person tearing down a fence erected on his land against his consent is not guilty of malicious mischief—59 Ill. 68; 2 Green Cr. R. 550; 8 Leigh, 719.

Subd. 1. Trees and timber.—To constitute malicious mischief as to trees and timber, there must be an unlawful entry—6 Gray, 349. A willful and malicious cutting down of trees is sufficient—Russ. & R. 373; or any malicious injury to trees—6 Up. Can. Q. B. 213; even if grafted on wild stock—16 Ind. 230; Russ. & R. 373; so, as to girdling or injuring trees or plants—19 Wend. 420; 2 Browne, (Pa.) 249; *contra*, 3 Me. 177. But if a tree be on the division line of the land, it is not malicious mischief to cut it down—8 Leigh, 719. Woods include a field overgrown with brush—5 Jones, (N. C.) 3.

Injury to machinery.—An indictment lies for a willful and malicious injury to movables and immovables—1 Dall. 335; 19 Wend. 419; so machinery is protected, although a part of it be missing—Deac. C. L. 1518; or when taken to pieces—Id. 1517; 4 Car. & P. 449. So as to plows used in agriculture—9 Cox C. C. 417; and manufacturing materials, and machinery, and the goods in process of manufacture, are protected—1 Moody & R. 549; as the warp prepared for carding and spinning—3 Cox C. C. 295; or the working tools of a loom, or tackle employed in weaving—6 Cox C. C. 198; or a steam-engine for working a mine—9 Car. & P. 241; or the scaffold for raising the mineral—9 Car. & P. 234. Injury to any material part of machinery is indictable—Russ. & R. 452; as plugging up the feed-pipe of a steam-engine—10 Cox C. C. 146.

603. The following acts do not constitute a public offense, within the meaning of the preceding section:

1. Gathering pitch from trees on the public lands of the State or United States, unless the bark from such trees is removed for more than one-eighth of their circumference, or cut made more than three inches in depth into the wood thereof;

2. Cutting trees upon the public lands of the State or United States, in good faith for the purpose of manufacturing the same into lumber or firewood, or preparing such lands for agricultural or mining purposes;

—unless such acts are committed upon swamp and overflowed, tide, salt marsh, or school lands belonging to the State, or within the limits of the lands granted by the United States to this State by Act of Congress of June thirteenth, eighteen hundred and sixty-four, relating to the Yosemite Valley and Mariposa Big Tree Grove.

The Yosemite Valley grant was not in the nature of a trust—6 Pac. Coast L. J. 106. It was a dedication to public use, brought about by the combined action of the Federal and State governments—id.

604. Every person who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in any case for which a punishment is not otherwise prescribed by this Code, is guilty of a misdemeanor.

605. Every person who either—

1. Maliciously removes any monument erected for the purpose of designating any point in the boundary of any lot or tract of land, or a place where a subaqueous telegraph cable lies; or,

2. Maliciously defaces or alters the marks upon any such monument; or,

3. Maliciously cuts down or removes any tree upon which any such marks have been made for such purpose, with intent to destroy such marks;

—is guilty of a misdemeanor.

Landmarks—see 2 Halst. 426; 8 Leigh, 719.

606. Every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any public jail or other place of confinement, is punishable by fine not exceeding ten thousand dollars, and by imprisonment in the State prison not exceeding five years.

607. Every person who willfully and maliciously cuts, breaks, injures, or destroys any bridge, dam, canal, flume, aqueduct, levee, embankment, reservoir, or other structure erected to create hydraulic power, or to drain or reclaim any swamp and overflowed tide or marsh land, or to store or conduct water for mining, manufacturing, rec-

lamation, or agricultural purposes, or for the supply of the inhabitants of any city or town, or any embankment necessary to the same, or either of them, or willfully or maliciously makes or causes to be made, any aperture in such dam, canal, flume, aqueduct, reservoir, embankment, levee, or structure, with intent to injure or destroy the same; or draws up, cuts, or injures any piles fixed in the ground for the purpose of securing any sea-bank, or sea-walls, or any dock, quay, or jetty, lock or sea-wall; or who, between the first day of October and the fifteenth day of April of each year, plows up or loosens the soil in the bed or on the sides of any natural water-course or channel, without removing such soil within twenty-four hours from such water-course or channel; or who, between the fifteenth day of April and the first day of October of each year, shall plow up or loosen the soil in the bed or on the sides of such natural water-course or channel, and shall not remove therefrom the soil so plowed up or loosened before the first day of October next thereafter, is guilty of a misdemeanor, and upon conviction, punishable by a fine not less than one hundred dollars and not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding two years, or by both; *provided*, that nothing in this section shall be construed so as to in any manner prohibit any person from digging or removing soil from any such water-course or channel, for the purpose of mining. [In effect April 12th, 1880.]

The Act of April 12th, 1880, amended this section by making the offense punishable as a misdemeanor—6 Pac. Coast L. J. 727; but, notwithstanding the repeal of the punishment, a prosecution for a felony committed before the repeal could be maintained, according to § 329 of the Political Code, but by indictment, not information—6 Pac. Coast L. J. 727.

608. Every person who willfully and maliciously burns, injures, or destroys any pile or raft of wood, plank, boards, or other lumber, or any part thereof, or cuts loose or sets adrift any such raft or part thereof, or cuts, breaks, injures, sinks, or sets adrift any vessel, the property of another, is punishable by fine not exceeding five hundred

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dollars, or by imprisonment in the county jail not exceeding six months.

Maliciously breaking up a boat—19 Wend. 420.

609. Every person who willfully removes any buoy or beacon, placed in any waters within this State by lawful authority, is guilty of a misdemeanor.

610. Every person who unlawfully masks, alters, or removes any light or signal, or willfully exhibits any light or signal, with intent to bring any vessel into danger, is punishable by imprisonment in the State prison not less than three nor more than ten years.

611. Every person who unlawfully obstructs the navigation of any navigable stream, is guilty of a misdemeanor.

612. Every person who throws, deposits, or permits another in his employ to throw or deposit, any sawdust, slabs or refuse lumber, in any place where it may be carried or fall into the waters of Humboldt Bay, without first having constructed piers, bulkheads, dams, or other contrivances, approved by the Board of Supervisors of Humboldt County, to prevent the same from escaping into the channels of such bay, is guilty of a misdemeanor.

613. Every person who, within the anchorage of any port, harbor, or cove of this State, into which vessels may enter for the purpose of receiving or discharging cargo, throws overboard from any vessel the ballast, or any part thereof, or who otherwise places or causes to be placed in such port, harbor, or cove, any obstructions to the navigation thereof, is guilty of a misdemeanor.

614. Every person mooring any vessel to or hanging on with a vessel to any buoy or beacon, placed by competent authority in any navigable waters of this State, is guilty of a misdemeanor.

615. Every person who willfully injures, defaces, or removes any signal, monument, building, or appurtenance

thereto, placed, erected, or used by persons engaged in the United States Coast Survey, is guilty of a misdemeanor.

616. Every person who intentionally defaces, obliterates, tears down, or destroys any copy or transcript, or extract from or of any law of the United States or of this State, or any proclamation, advertisement, or notification set up at any place in this State, by authority of any law of the United States or of this State, or by order of any court, before the expiration of the time for which the same was to remain set up, is punishable by fine not less than twenty nor more than one hundred dollars, or by imprisonment in the county jail not more than one month.

Tearing down advertisements and not putting them up again is within the statute—Addis. 267; 66 Ill. 210.

617. Every person who maliciously mutilates, tears, defaces, obliterates, or destroys any written instrument, the property of another, the false making of which would be forgery, is punishable by imprisonment in the State prison for not less than one nor more than five years.

Malicious destruction of records of a police court—22 Up. Can. C. P. 246.

618. Every person who willfully opens or reads, or causes to be read, any sealed letter not addressed to himself, without being authorized so to do, either by the writer of such letter or by the person to whom it is addressed, and every person who, without the like authority, publishes any of the contents of such letter, knowing the same to have been unlawfully opened, is guilty of a misdemeanor.

619. Every person who willfully discloses the contents of a telegraphic message, or any part thereof, addressed to another person, without the permission of such person, unless directed so to do by the lawful order of a court, is punishable by imprisonment in the State prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars,

or by both fine and imprisonment. [Approved April 15th, 1880.]

620. Every person who willfully alters the purport, effect, or meaning of a telegraphic message to the injury of another, is punishable as provided in the preceding section.

621. Every person not connected with any telegraph office who, without the authority or consent of the person to whom the same may be directed, willfully opens any sealed envelope inclosing a telegraphic message and addressed to any other person, with the purpose of learning the contents of such message, or who fraudulently represents any other person and thereby procures to be delivered to himself any telegraphic message addressed to such other person, with the intent to use, destroy, or detain the same from the person or persons entitled to receive such message, is punishable as provided in section six hundred and nineteen.

622. Every person, not the owner thereof, who willfully injures, disfigures, or destroys any monument, work of art, or useful or ornamental improvement within the limits of any village, town, or city, or any shade tree or ornamental plant growing therein, whether situated upon private ground or on any street, sidewalk, or public park or place, is guilty of a misdemeanor.

623. Every person who maliciously cuts, tears, defaces, breaks, or injures any book, map, chart, picture, engraving, statue, coin, model, apparatus, or other work of literature, art, or mechanics, or object of curiosity, deposited in any public library, gallery, museum, collection, fair, or exhibition, is guilty of felony.

624. Every person who willfully breaks, digs up, obstructs, or injures any pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenances or appendages therewith connected, is guilty of a misdemeanor.

625. Every person who, with intent to defraud or injure, opens or causes to be opened, or draws water from any stop-cock or faucet by which the flow of water is controlled, after having been notified that the same has been closed or shut for specific cause, by order of competent authority, is guilty of a misdemeanor.

TITLE XV.

Miscellaneous Crimes.

CHAP. I. VIOLATION OF THE LAWS FOR THE PRESERVATION OF GAME AND FISH, §§ 626-37.

II. OF OTHER AND MISCELLANEOUS OFFENSES, §§ 654-78.

CHAPTER I.

VIOLATION OF THE LAWS FOR THE PRESERVATION OF GAME
AND FISH.

- § 626. Destruction of grouse, duck, etc., when prohibited.
- § 627. Same.
- § 628. Destruction of elk, etc., when prohibited.
- § 629. Having game in possession when killing thereof is prohibited.
- § 630. Use of phosphorus on land in certain counties.
- § 631. Taking trout, when prohibited.
- § 632. Same.
- § 633. Taking trout by nets, etc., prohibited.
- § 634. Taking salmon, when prohibited.
- § 635. Use of explosive substances in fishing prohibited.
- § 636. Permanent contrivances for catching.
- § 637. Fishways and ladders, penalties for not keeping.

626. Every person who, in any of the counties of this State, between the fifteenth day of March and the fifteenth day of September, in each year, hunts, pursues, takes, kills, or destroys quail, partridges, or grouse, or any kind of duck, or rail, or marsh-hens, is guilty of a misdemeanor. Every person who, in the State of California, between the first day of January and the first day of July, in each year, hunts, pursues, takes, kills, or destroys doves, is guilty of a misdemeanor. Every person who, at any time, takes, gathers, or destroys the eggs of any mallard, wood, or summer duck, red-head, teal, gadwell, or gray duck, or any other species of wild-duck, is guilty of a misdemeanor. Every person who shall have any of the aforesaid game, or any male deer or buck, or any female deer or doe, or any antelope, elk, or mountain sheep in his possession, at a time when it is unlawful to kill the same, as provided by this section, or by section six hundred and twenty-eight of this Code, is guilty of a misdemeanor; and proof of the possession of any of the

aforesaid game, at a time when it is unlawful to kill the same within the county wherein the same is found, shall be *prima facie* evidence, in any prosecution for a violation of any of the provisions of this section, that the person or persons in whose possession the same is found, took, killed, or destroyed the same in the county wherein the same is found, during the period when it was unlawful to take, kill, or destroy the same. [In effect April 16th, 1880.]

627. Every person who, in the counties of Plumas, Lassen, or Sierra, between the fifteenth day of March and the first day of September, in each year, takes, kills, or destroys quail, partridges, or grouse, or who, in either of such counties, between the fifteenth day of March and the fifteenth day of August in each year, takes, kills, or destroys mallard, wood, teal, spoonbill, or any kind of broad-bill ducks, is guilty of a misdemeanor. [Approved February 15th, 1876.]

628. Every person who, between the first day of November in each year, and the first day of July of the following year, hunts, pursues, takes, kills, or destroys any male deer or buck, is guilty of a misdemeanor. Every person who shall, for the period of four years from and after the passage of this act, pursue, hunt, take, kill, or destroy any antelope, elk, or mountain sheep, or female deer or doe, shall be guilty of a misdemeanor. Every person who, after the passage of this act, shall kill any spotted fawn, shall be guilty of a misdemeanor. Every person who, after the passage of this act, shall take, kill, or destroy any of the animals mentioned in this section, at any time, unless the carcass of such animal is used or preserved by the person slaying it, or is sold for food, is guilty of a misdemeanor. [In effect March 30th, 1878.]

629. Every person who buys, sells, or has in his possession any of the game enumerated in the two preceding sections, within the time the taking or killing thereof is

prohibited, except such as are tamed or kept for show or curiosity, is guilty of a misdemeanor.

630. Every person who, in the counties of Santa Clara, Contra Costa, San Joaquin, Santa Cruz, or San Mateo, uses or distributes phosphorus upon any land or ground, between the first day of March and the first day of November, in any year, is guilty of a misdemeanor.

631. Any person or persons who shall at any time net, pound, weir, cage, or trap any quail, partridge, or grouse, and any person or persons who shall sell or give away, or shall have in his or her possession any quail, partridge, or grouse that have been snared, captured, or taken in or by means of any net, pound, weir, cage, or trap, is guilty of a misdemeanor. [In effect March 7th, 1881.]

632. Every person who, in the counties of Santa Clara, Alpine, Santa Cruz, Lake, San Mateo, Monterey, Sonoma, Tuolumne, Alameda, Marin, Placer, Nevada, Plumas, Sierra, San Luis Obispo, Solano, Mariposa, Mendocino, or Napa, at any time, takes or catches any trout, except with hook and line, is guilty of a misdemeanor. [In effect March 31st, 1876.]

633. Every person who takes, catches, or kills any speckled trout, brook or salmon trout, or any variety of trout, between the first day of November and the first day of April in the following year, is guilty of a misdemeanor. [In effect March 30th, 1878.]

634. Every person who, between the thirty-first day of July and the first day of September of each year, takes, or catches, buys, sells, or has in his possession any fresh salmon, is guilty of a misdemeanor. Every person who shall set or draw, or assist in setting or drawing any net or seine for the purpose of taking or catching salmon in any of the waters of this State, at any time between sunrise of each Saturday and twelve o'clock noon of the following Sunday, is guilty of a misdemeanor. Every per-

son who, between the first day of April and the thirty-first day of December in each year, takes or catches, buys or sells, or has in his possession any fresh shad, is guilty of a misdemeanor. Nothing in this section shall be so construed as to prohibit any person from catching fish with hook and line, at any time, in the tide-waters of the State. [Approved March 2nd, 1881.]

635. Every person who places, or allows to pass into any of the waters of this State, any lime, gas, tar, cocculus indicus, or any other substance deleterious to fish, is guilty of a misdemeanor. And every person who uses any poisonous or explosive substances for the purpose of taking or destroying fish, is guilty of a misdemeanor; *provided*, that sawdust shall not be deemed a deleterious substance. Any person who shall catch, take, or carry away any trout, or other fish, from any stream, pond, or reservoir, belonging to any person or corporation, without the consent of the owner thereof, which stream, pond, or reservoir has been stocked with fish by hatching therein eggs or spawn, or by placing the same therein, is guilty of a misdemeanor. [In effect April 1st, 1876.]

636. Every person who shall set, use, or continue, or who shall assist in setting, using, or continuing any pound, weir, set-net, trap, or other fixed or permanent contrivance for catching fish in the waters of this State, is guilty of a misdemeanor. Every person who shall cast, extend, or set any seine or net of any kind, for the catching of fish in any river, stream, or slough of this State, which shall extend more than one-third across the width of said river, stream, or slough, at the time and place of such fishing, is guilty of a misdemeanor. Every person who, by seine, or any other means, shall catch the young of fish of any species, which at the time of capture are too small to be marketed, and who shall not return the same to the water, immediately and alive, or who shall sell, or offer for sale, any such fish, fresh or dried, is guilty of a misdemeanor. Every person convicted of a violation of

any of the provisions of this chapter, shall be punished by fine of not less than fifty dollars and not more than three hundred dollars, or imprisonment in the county jail of the county where the offense was committed, for not less than thirty days nor more than six months, or by both such fine and imprisonment. One-half of all moneys collected for fines for violation of the provisions of this chapter shall be paid to informers, and one-half thereof to the district attorney of the county in which the action is prosecuted; all other costs shall be charged against the county in which the action is prosecuted. Nothing in this chapter shall be construed to prohibit the United States fish commissioners, or the fish commissioners of the State of California, from taking such fish as they shall deem necessary for the purpose of artificial hatching, nor at any time. All nets, seines, fishing tackle, boats, or other implements used in catching or taking fish in violation of the provisions of this chapter, shall be forfeited, and may be seized by the peace officer of the county, or assistant, or person acting under the fish commissioners, and may be by them destroyed, or may be sold at public auction by the party making such seizure, upon notice posted in such county for five days. The person making such seizure and sale shall be entitled to retain one-half of the proceeds of such sale, and the balance shall be paid into the school fund of the county, in case the seizure and sale is made by a peace officer thereof, or to the fish commissioners, if made by a person appointed by them; provided, that all nets having meshes of less than one and a half inches in size, when seized under the provisions of this section, must be destroyed. [Approved March 2nd, 1881.]

637. Every owner of a dam or other obstruction in the waters of this State, who, after being requested by the fish commissioners so to do, fails to construct and keep in repair sufficient fishways or ladders on such dam or obstruction, is guilty of a misdemeanor.

See Pol. Code, § 4046, subd. 23. See 10 Mass. 391; 5 Pick. 199.

CHAPTER II.

OF OTHER AND MISCELLANEOUS OFFENSES.

- § 638. Neglect or postponement of telegraphic messages.
- § 639. Employé using information from messages.
- § 640. Clandestinely learning the contents of a telegram.
- § 641. Bribing telegraphic operator.
- § 642. Collecting tolls, etc., at San Francisco, without authority.
- § 643. Violations of police regulations of San Francisco harbor.
- § 644. Enticing seamen to desert.
- § 645. Harboring deserting seamen.
- § 646. Aiding apprentices to run away or harboring them.
- § 647. Vagrants.
- § 648. Issuing or circulating paper money.
- § 649. Officers of fire department issuing false certificates of exemption.
- § 650. Sending letters threatening to expose another.
- § 651. Requiring apprentices to work more than eight hours.
- § 652. National Guard failure to attend parade, obey orders, etc.
- § 653. Member of National Guard, insubordination of.
- § 654. Abuse of school teachers.

638. Every agent, operator, or employé of any telegraph office, who willfully refuses or neglects to send any message received at such office for transmission, or willfully postpones the same out of its order, or willfully refuses or neglects to deliver any message received by telegraph, is guilty of a misdemeanor. Nothing herein contained shall be construed to require any message to be received, transmitted, or delivered, unless the charges thereon have been paid or tendered, nor to require the sending, receiving, or delivery of any message counseling, aiding, abetting, or encouraging treason against the government of the United States or of this State, or other resistance to the lawful authority, or any message calculated to further any fraudulent plan or purpose, or to instigate or encourage the perpetration of any unlawful act, or to facil-

itate the escape of any criminal or person accused of crime.

See Civ. Code, §§ 2161, 2162, 2207.

639. Every agent, operator, or employé of any telegraph office, who in any way uses or appropriates any information derived by him from any private message passing through his hands, and addressed to any other person, or in any other manner acquired by him by reason of his trust as such agent, operator, or employé, or trades or speculates upon any such information so obtained, or in any manner turns, or attempts to turn, the same to his own account, profit, or advantage, is punishable by imprisonment in the State prison not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment.

640. Every person who, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently reads, or attempts to read, any message, or to learn the contents thereof, whilst the same is being sent over any telegraph line, or willfully and fraudulently, or clandestinely, learns or attempts to learn the contents or meaning of any message, while the same is in any telegraph office, or is being received thereat or sent therefrom, or who uses or attempts to use, or communicates to others, any information so obtained, is punishable as provided in section six hundred and thirty-nine.

641. Every person who, by the payment or promise of any bribe, inducement, or reward, procures or attempts to procure any telegraph agent, operator, or employé to disclose any private message, or the contents, purport, substance, or meaning thereof, or offers to any such agent, operator, or employé any bribe, compensation, or reward for the disclosure of any private information received by him by reason of his trust as such agent, operator, or em-

ployè, or uses or attempts to use any such information so obtained, is punishable as provided in section six hundred and thirty-nine.

642. Every person who collects any toll, wharfage, or dockage, or lands, ships, or removes any property upon or from any portion of the water front of San Francisco, or from or upon any of the wharves, piers, or landings under the control of the Board of State Harbor Commissioners, without being by such board authorized so to do, is guilty of a misdemeanor.

See Pol. Code, §§ 2524, subd. 6; 2527, 2539, 2540.

643. Every person who violates any of the provisions of the laws of this State relating to sailor boarding-houses and shipping-offices in San Francisco, or who receives any gratuity or reward other than as therein provided, for the performance of any services under a license issued pursuant to the provisions of such laws, is guilty of a misdemeanor.

See Pol. Code, §§ 2583-2607.

644. Every person who entices seamen to desert from any vessel lying in the waters of this State, and on board of which they have shipped for a term or voyage unexpired at the time of such enticement, is guilty of a misdemeanor.

See Pol. Code, § 2602.

645. Every person who harbors or secretes any seaman, knowing him to be shipped, and with a view to persuade or enable him to desert, is guilty of a misdemeanor.

See Pol. Code, §§ 2602, 2607.

646. Every person who willfully and knowingly aids, assists, or encourages to run away, or who harbors or conceals any person bound or held to service or labor, is guilty of a misdemeanor.

See Civ. Code, § 264.

647. Every person (except a California Indian) without visible means of living, who has the physical ability to work, and who does not for the space of ten days seek

employment, nor labor when employment is offered him; every healthy beggar who solicits alms as a business; every person who roams about from place to place without any lawful business; every idle or dissolute person, or associate of known thieves, who wanders about the streets at late or unusual hours of the night, or who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; every lewd and dissolute person, who lives in and about houses of ill-fame, and every common prostitute and common drunkard, is a vagrant, and punishable by imprisonment in the county jail not exceeding ninety days.

At common law, all vagrants may be taken up and bound over to good behavior—5 Allen, 511; 2 Lea, (Tenn.) 158; 108 Mass. 17; 1 McMull. 503; 6 Mod. 240; but there must be reasonable grounds of suspicion—14 Mo. 138; 2 Ld. Raym. 1296; 3 Taunt. 14. A vagrant is a person who has no lawful means of support—4 Parker Cr. R. 611; 59 Ind. 173. In Massachusetts, it is sufficient if he habitually mispends his time—5 Allen, 511; 108 Mass. 17. Statutes concerning vagrants are constitutional—1 McMull. 501; 4 Parker Cr. R. 611; and see 4 id. 616; 5 Binn. 516; 14 Gray, 397; 108 Mass. 17; 65 N. C. 339; 49 Ala. 22; 51 Ga. 264; 52 id. 574.

Vagrancy.—Statutes concerning vagrants are constitutional—1 McMull. 501; 4 Parker Cr. R. 611; and see id. 616; 5 Binn. 516; 14 Gray, 397; 108 Mass. 17; 65 N. C. 339; 49 Ala. 22; 51 Ga. 264; 52 id. 574. A person who has no means of support, and is not in good faith seeking employment, is a vagrant—59 Ind. 173; 4 Parker Cr. R. 611; 52 Ala. 378; so, if a person habitually mispends his time, it is sufficient—5 Allen, 519; 108 Mass. 17. At common law, all idle persons and vagrants may be taken up and bound over to good behavior—108 Mass. 17; 5 Allen, 511; 2 Lea, (Tenn.) 158; 1 McMull. 503; 6 Mod. 240; but to justify arrest, there must be reasonable grounds of suspicion—14 Mo. 138; 2 Ld. Raym. 1296; 3 Taunt. 14.

648. Every person who makes, issues, or puts in circulation any bill, check, ticket, certificate, promissory note, or the paper of any bank, to circulate as money, except as authorized by the laws of the United States, for the first offense is guilty of a misdemeanor, and for each and every subsequent offense is guilty of felony.

See *post*, § 654; Civ. Code, § 356. See Const. Cal. art. iv, § 35.

649. Every officer of a fire department who willfully issues, or causes to be issued, any certificate of exemption to a person not entitled thereto, is guilty of a misdemeanor.

650. Every person who knowingly and willfully sends or delivers to another any letter or writing, whether subscribed or not, threatening to accuse him or another of a crime, or to expose or publish any of his failings or infirmities, is guilty of a misdemeanor.

See *ante*, § 523.

651. Every person having a minor child under his control, either as a ward or an apprentice, who, except in vinicultural or horticultural pursuits, or in domestic or household occupations, requires such child to labor more than eight hours in any one day, is guilty of a misdemeanor.

See Stat. 1872.

652. Every commissioned officer of the National Guard, who willfully fails to attend any parade or encampment, and every member of the National Guard who neglects or refuses to obey the lawful command of his superior on any day of parade or encampment, or to perform such military duty as may be lawfully required of him, is punishable by a fine of not less than five nor more than one hundred dollars.

See Pol. Code, §§ 1930, 2018-2030.

653. Every member of the National Guard who, when duly notified, fails to appear at a parade, or who disobeys any lawful order, or who uses disrespectful language towards his superior, or who commits any act of insubordination, is guilty of a misdemeanor.

654. Every parent, guardian, or other person, who upbraids, insults, or abuses any teacher of the public schools, in the presence or hearing of a pupil thereof, is guilty of a misdemeanor. [Approved March 30th, in effect July 1st, 1874.]

TITLE XVI.

General Provisions.

- § 654. Acts made punishable by different provisions of this Code.
- § 655. Acts punishable under foreign law.
- § 656. Foreign conviction or acquittal.
- § 657. Contempts, how punishable.
- § 658. Mitigation of punishment in certain cases.
- § 659. Aiding in misdemeanor.
- § 660. Sending letters, when deemed complete.
- § 661. Removal from office for neglect of official duty.
- § 662. Omission to perform duty, when punishable.
- § 663. Attempts to commit crimes, when punishable.
- § 664. Attempts to commit crimes, how punishable.
- § 665. Restrictions upon the preceding sections.
- § 666. Second offense, how punished after conviction of former offense.
- § 667. Second offenses, how punished after conviction of attempt to commit a State prison offense.
- § 668. Foreign conviction for former offense.
- § 669. Second term of imprisonment, when to commence.
- § 670. When term of imprisonment commences, etc.
- § 671. Imprisonment for life.
- § 672. Fine may be added to imprisonment.
- § 673. Civil rights of convict suspended.
- § 674. Civil death.
- § 675. Limitations on two preceding sections.
- § 676. Person of convict protected.
- § 677. Forfeitures.
- § 678. Valuation in gold coin.

654. An act or omission which is made punishable in different ways by different provisions of this Code, may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. In the cases specified in sections six hundred and forty-eight, six hundred and sixty-seven, and six hundred and

sixty-eight, the punishments therein prescribed must be substituted for those prescribed for a first offense, if the previous conviction is charged in the indictment and found by the jury.

Effect of plea of guilty is to confess the offense charged, which includes the previous conviction, and defendant must be sentenced for a felony—49 Cal. 395. See *post*, § 1158.

655. An act or omission declared punishable by this Code is not less so because it is also punishable under the laws of another State, government, or country, unless the contrary is expressly declared.

Adjustment of punishment.—When an offense is committed against two sovereignties, the first prosecuting absorbs it—97 U. S. 309; but when partly against one and partly against the other, the sentence of the other is to be taken into account in adjusting the sentence—see Whart. Cr. Pl. & Pr. §§ 441, 453; and the grade of offense will be considered—*id.*; Whart. Conf. of L. § 920.

656. Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another State, government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.

See *post*, § 1016.

657. A criminal act is not the less punishable as a crime because it is also declared to be punishable as a contempt.

Instances.—Assault on a judge—25 La. An. 532; rescues and escapes—1 Dutch. 209; misbehavior or malpractice of officer—1 Blackf. 166; 2 Burr. 799; misconduct of inferior judges—63 Ind. 81; libelous publications of court proceedings—16 Ark. 384; 4 Ill. 405; conspiracies to obstruct justice—25 Vt. 415; 2 Hill, (S. C.) 282; 2 Pars. Cas. 357; 3 Zab. 33; 50 Ind. 465; fraud and corruption of solicitors and officers of court—5 Best. & S. 299.

658. When it appears, at the time of passing sentence upon a person convicted upon indictment, that such person has already paid a fine or suffered an imprisonment for the act of which he stands convicted, under an order adjudging it a contempt, the court authorized to pass sentence may mitigate the punishment to be imposed, in its discretion.

Discretion of court—See Desty's Crim. Law, § 46 b.

659. Whenever an act is declared a misdemeanor, and no punishment for counseling or aiding in the commission of such act is expressly prescribed by law, every person who counsels or aids another in the commission of such act is guilty of a misdemeanor.

Accessories.—The offense of being accessory is committed in the county where the substantive acts are consummated—13 Bush, 142; 114 Mass. 307; in which county only can he be indicted—27 Cal. 340; 57 How. Pr. 342; 1 Parker Cr. R. 246; see 17 Ark. 561; 19 Ind. 421. At common law, a person indicted as principal cannot be convicted on proof showing him to be an accessory, and *e converso*—40 Cal. 129; 23 id. 404; 41 id. 429; 33 id. 75; 32 id. 160; 12 Ala. 158; 15 Ga. 346; 52 id. 287; 33 Miss. 613; 8 Neb. 80; 49 N. H. 39; 65 N. C. 572; 31 N. J. L. 65; 83 Ill. 479; Russ. & R. C. C. 25; 9 Cox C. C. 242; 7 Car. & P. 575; 1 Leach, 515; but by statute, the offense is made substantive and independent—40 Cal. 129; 56 Ga. 92; 8 Ill. 368; 49 id. 410; 14 Ind. 52; 46 Iowa, 265; 12 Kan. 550; 29 Me. 84; 126 Mass. 242; 18 Ohio St. 496; 19 Ohio, 131; 25 Pa. St. 221; 12 Wis. 532; Law R. 1 C. C. 77; Bell C. C. 243; and in States where all are principals, he may be indicted and convicted as principal—14 Bush, 232; 40 Iowa, 169; 47 Ill. 333; 37 Pa. St. 108; 84 id. 187; 53 Mich. 106; though the prime actor be dead or escaped—2 Brev. 338; Meigs, 106; and see 24 Mo. 475. In States where there is a common-law jurisdiction as to crimes, the accessory can only be tried jointly with or after conviction of the principal—3 Mass. 126; 16 id. 423; 5 Pick. 429; 126 Mass. 242; 4 McLean, 317; Thach, C. C. 63; 1 Parker Cr. R. 246; 5 Watts & S. 385; 2 Va. Cas. 211; 5 Bush, 698; 11 id. 154; 15 Fla. 592; 44 Ind. 214; and the indictment may charge him in one count as principal, and the other as accessory—48 Cal. 189. Aiders and abettors may be convicted, although the principal has been acquitted—10 Cal. 68; 28 Ga. 216; 29 Mo. 32; 1 Leach, 360; 2 Shaw, 370; Salk. 334; Russ. & R. C. C. 314. The principal and accessory may be indicted together or separately, without reference to previous conviction or acquittal—10 Cal. 68; 20 id. 439. See *ante*, §§ 32, 33; and see Desty's Crim. Law, §§ 40 a, b, c. Punishment of accessories—see Desty's Crim. Law, § 55 b.

660. In the various cases in which the sending of a letter is made criminal by this Code, the offense is deemed complete from the time when such letter is deposited in any post-office or any other place, or delivered to any person, with intent that it shall be forwarded.

As to mailed libels—see 1 Dall. 388; 4 Barn. & Ald. 95. Posting indecent matter—11 Blatchf. 346; see 96 U. S. 727. As to challenges to fight—3 Brev. 243; 59 Ga. 332; 1 Hawks. 487; 1 Const. S. C. 107; 2 Camp. 506; see 12 Ala. 276; and it is not necessary to prove that it ever reached its destination—2 Camp. 506. Mailing offer to bribe—2 Dall. 384.

661. In addition to the penalty affixed by express terms, to every neglect or violation of official duty on the part of public officers—State, county, city, or township—where it is not so expressly provided, they may, in the discretion of the court, be removed from office.

See Pol. Code, §§ 841 *et seq.*

662. No person is punishable for an omission to perform an act, where such act has been performed by another person acting in his behalf, and competent by law to perform it.

663. Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury and directs such person to be tried for such crime.

664. Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:

1. If the offense so attempted is punishable by imprisonment in the State prison for five years, or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the State prison, or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted.

2. If the offense so attempted is punishable by imprisonment in the State prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year.

3. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

4. If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction for the offense so attempted.

Attempts included in §§ 216, 217, 220-222 are not included in this section. See Desty's Crim. Law, § 12.

665. The last two sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed.

666. Every person who, having been convicted of any offense punishable by imprisonment in the State prison, commits any crime after such conviction, is punishable therefor as follows:

1. If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the State prison for any term exceeding five years, such person is punishable by imprisonment in the State prison not less than ten years.

2. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the State prison for five years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the State prison not exceeding ten years.

3. If the subsequent conviction is for petit larceny, or any attempt to commit an offense which, if committed, would be punishable by imprisonment in the State prison not exceeding five years, then the person convicted of such subsequent offense is punishable by imprisonment in the State prison not exceeding five years.

Second conviction.—A statute providing that a second conviction for petit larceny makes the party guilty of a felony is not *ex post facto*—45 Cal. 432; 43 Mass. 413; 3 Gratt. 738. See Const. Provisions, *ante*, page 18.

Increased punishment.—Increased punishment may be imposed for a subsequent offense—45 Cal. 430; 47 Id. 113; 3 Dall. 386; 5 Rawle, 383; 2 Pick. 165; 1d. 172; 2 Met. 413; 3 Id. 588; 9 Gratt. 743; 47 Md. 485; 23 Ill. 647; 3 Cowen, 347; 3 Met. 553; 8 Id. 633; 1d. 635; 11 Id. 681; 11 Pick. 28; 16 Id. 492; 21 Id. 492; 7 Serg. & K. 489; 14 Id. 69; 1 Root, 163; 9 Phila. 863; 19 Mass. 166; and this will not be putting the party twice in jeopardy, nor is it punishment for the first offense—47 Cal. 114. A mere conviction of the prior offense is sufficient, without sentence—1 Hill, 261; *contra*, 4 Serg. & K. 69; and see 53 N. Y. 511; 55 Id. 512; 5 Hun, 562; 6 Kan. 379. See *ante*, § 654.

667. Every person who, having been convicted of petit larceny, or of an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the State prison, commits any crime after such conviction, is punishable as follows:

1. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the State prison for life, at the discretion of the court, such person is punishable by imprisonment in such prison during life.

2. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the State prison for any term less than for life, such person is punishable by imprisonment in such prison for the longest term prescribed, upon a conviction for such first offense.

3. If the subsequent conviction is for petit larceny, or for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the State prison, then such person is punishable by imprisonment in such prison not exceeding five years.

See *ante*, § 654; 45 Cal. 432.

668. Every person who has been convicted in any other State, government, or country, of an offense which, if committed within this State, would be punishable by the laws of this State by imprisonment in the State prison, is punishable for any subsequent crime committed within this State in the manner prescribed in the last two sections, and to the same extent as if such first conviction had taken place in a court of this State.

See *ante*, § 654.

Rule different in New York—1 Parker Cr. R. 645.

669. When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to

which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be.

Punishment.—Imprisonment commences on conviction and sentence—68 N. Y. 343; 6 Baxt. (Tenn.) 539. Imprisonment on a second conviction commences on a termination of the first term of sentence—22 Cal. 135; 49 Id. 463; 5 Day, 175; 11 Met. 581; 5 Eng. 318; 44 Mo. 279; 18 Ohio St. 46; 45 Mo. 331; 13 Pa. St. 631; 1 Va. Cas. 151; 4 Brown P. C. 360; 1 Leach, 441; Law R. 2 Q. B. 379; but see 11 Ind. 389, as in case of pardon or reversal of sentence—11 Met. 581; 9 Nev. 44; 4 Rawle, 259; 12 Gray, 618.

670. The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment, and if, thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment, and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

671. Whenever any person is declared punishable for a crime by imprisonment in the State prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed.

Punishment for crime is and ought to be largely in the discretion of the court—56 Ga. 545; 58 Id. 200; and the question as to what is within the limits of the law is for the judicial discretion—6 Call, 245.

672. Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding two hundred dollars, in addition to the imprisonment prescribed.

Fines in cases where the statute is silent—1 Gall. 488; see 8 Coke, 59.

673. A sentence of imprisonment in a State prison for any term less than for life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment.

Disfranchisement—63 Pa. St. 112; 2 Leigh, 724; 27 Ark. 469; 6 Blackf. 529; 3 Cowen, 686; 28 Ind. 393.

674. A person sentenced to imprisonment in the State prison for life is thereafter deemed civilly dead.

675. The provisions of the last two preceding sections must not be construed to render the persons therein mentioned incompetent as witnesses upon the trial of a criminal action or proceeding, or incapable of making and acknowledging a sale or conveyance of property. [Approved March 30th, in effect July 1st, 1874.]

676. The person of a convict sentenced to imprisonment in the State prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he was not convicted or sentenced.

Convicts can be punished only according to law—34 Conn. 132; 4 Barb. 151; 52 N. H. 492; Russ. & R. C. C. 20; Leigh & C. 394; 9 Cox C. C. 449; 6 Jur. 243; and for any excess or violation of punishment those in charge are liable—10 Barn. & C. 445.

677. No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law; and all forfeitures to the people of this State, in the nature of a deodand, or where any person shall flee from justice, are abolished.

678. Whenever in this Code the character or grade of an offense, or its punishment, is made to depend upon the value of the property, such value shall be estimated exclusively in United States gold coin. [Approved March 30th, in effect July 1st, 1874.]

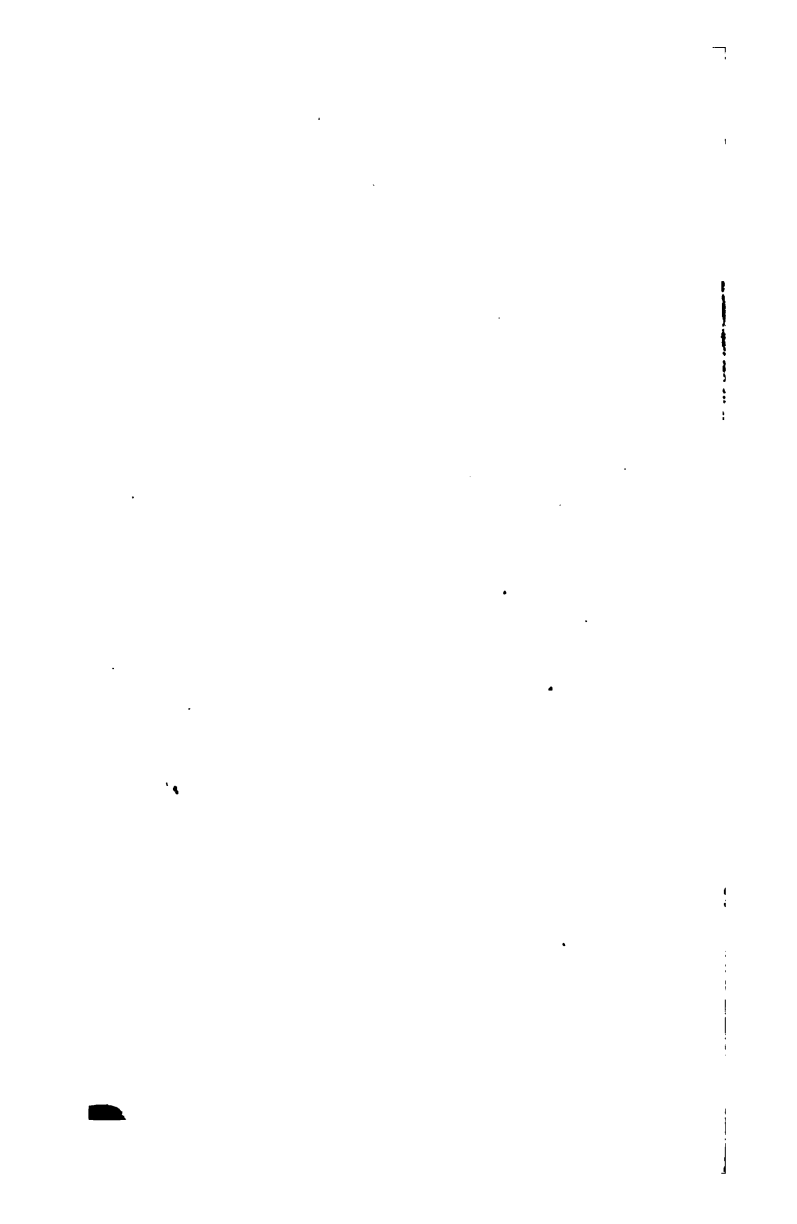
PART II.

OF CRIMINAL PROCEDURE.

(§§ 681-1570.)

PEN. CODE—24.

[277]



PRELIMINARY PROVISIONS.

- § 681. No person punishable but on legal conviction.
- § 682. Public offenses, how prosecuted.
- § 683. Criminal action defined.
- § 684. Parties to a criminal action.
- § 685. The party prosecuted known as defendant.
- § 686. Rights of defendant in a criminal action.
- § 687. Second prosecution for the same offense prohibited.
- § 688. No person to be a witness against himself in a criminal action, or to be unnecessarily restrained.
- § 689. No person to be convicted but upon verdict or judgment.

681. No person can be punished for a public offense, except upon a legal conviction in a court having jurisdiction thereof.

See *post*, § 689; Const. Cal. art. 1, § 13.

Sentence must be preceded by conviction—16 Ark. 601; 1 Caines, 72; 24 Me. 594; but it does not always follow conviction—14 Pick. 88; 17 id. 286; 8 Wend. 204. Summary convictions are regulated by statute—1 Parker Cr. R. 95; which must be strictly followed, unless it is merely directory—1 Ashm. 410. In summary convictions, jurisdictional facts must affirmatively appear—7 Barb. 462; 4 Johns. 292; 19 Johns. 39; 3 Me. 51; 14 Mass. 224; 10 Met. 222; 2 Yeates, 475.

682. Every public offense must be prosecuted by indictment or information, except—

1. Where proceedings are had for the removal of civil officers of the State.
2. Offenses arising in the militia when in actual service, and in the land and naval forces in time of war, or which the State may keep, with the consent of Congress, in time of peace.
3. Offenses tried in Justices' and Police Courts. [In effect April 9th, 1880.]

Prosecution.—Neither the Constitution nor the Code prohibits the prosecution by indictment of any offense, including misdemeanors—53 Cal. 412. The County Court had jurisdiction over indictments for misdemeanor; justices of the peace being exclusive as to misdemeanors where no indictment was found—53 Cal. 412. See Const. Cal. art. 4, §§ 13.

683. The proceedings by which a party charged with a public offense is accused and brought to trial and punishment, is known as a criminal action.

Criminal case means one involving punishment for crime—8 Ch. L. N. 57; 21 Int. Rev. Rec. 251; or charge for official misconduct—1 Wood, 499.

684. A criminal action is prosecuted in the name of the people of the State of California, as a party, against the person charged with the offense.

685. The party prosecuted in a criminal action is designated in this Code as the defendant.

686. In a criminal action the defendant is entitled—

1. To a speedy and public trial.
2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.

3. To produce witnesses on his behalf, and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the State.

Subd. 1. Excluding jurors summoned for the term, but not empaneled, is not deprivation of right to public trial—53 Cal. 491.

Subd. 3. The deposition taken by the committing magistrate may be read in evidence on the trial, if it appears that the witness is dead, or insane, or cannot be found—50 Cal. 96; and if perjury is charged, the prosecution on the trial may prove, by parole evidence, what accused swore to at the examination—*Id.* The deposition taken under § 869 of this Code is not admissible against the defendant, under this section, unless taken in manner and form, and is certified as required by § 869. The two sections are to be taken *in pari materia*—54 Cal. 577;

see *post*, §§ 869 and 1213, and notes. The certificate must set forth actual compliance with all requirements of the statute—6 Cal. 559; a mere jurat is not admissible—54 *id.* 575. Query: Is this section constitutional?—54 Cal. 575. See Const. Cal. art. 1, § 13.

687. No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted.

Jeopardy.—Jeopardy attaches when a party is once placed upon his trial before a competent court, on a valid indictment, and an acquittal before the jury or a discharge of the jury without consent of prisoner—4 Cal. 376; 5 *id.* 278; 38 *id.* 467; 48 *id.* 329; 8 Blatchf. 528; 15 Ark. 261; 1 Bail. 651; 3 Brev. 421; 16 Conn. 54; 3 Cush. 212; 6 Ark. 169; 7 Ga. 422; 3 Hawks, 381; 2 Halst. 172; 17 Mass. 515; 7 Mo. 644; 19 *id.* 683; 3 Smedes & M. 751; 3 Tex. 118; 1 Swan, 14; 2 Tyler, 471; 8 Wend. 640; 7 Port. 187. See Const. Prov. art. 1, § 13, *ante*, p. 17; and see Desty's Const. Cal. art. 1, § 13, and notes.

688. No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense, be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

Defendant need not be a witness in his own behalf—36 Cal. 522; and his refusal, not to prejudice his case—53 *id.* 66; 36 *id.* 522; and see Const. Prov. *ante*, p. 18. He is to be free from shackles and bonds—42 Cal. 167. The common-law rule obtains—6 Harg. St. Tri. 230, 231, 244; 1 Leach, 36.

689. No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer in the case mentioned in section one thousand and eleven, or upon a judgment of a court, a jury having been waived, in a criminal case not amounting to felony. [In effect February 25th, 1880.]

If defendant does not plead, judgment may be pronounced against him—28 Cal. 235; 29 *id.* 562. See *post*, § 1011, and notes.

TITLE I.

Of the Prevention of Public Offenses.

- CHAP. I. OF LAWFUL RESISTANCE, §§ 692-4.
II. OF THE INTERVENTION OF THE OFFICERS OF JUSTICE, §§ 697-8.
III. SECURITY TO KEEP THE PEACE, §§ 701-14.
IV. POLICE IN CITIES AND TOWNS, AND THEIR ATTENDANCE AT EXPOSED PLACES, §§ 719-720.
V. SUPPRESSION OF RIOTS, §§ 723-33.

CHAPTER I.

OF LAWFUL RESISTANCE.

- § 692. Lawful resistance, by whom made.
- § 693. By the party, in what cases and to what extent.
- § 694. By other parties, in what cases.

692. Lawful resistance to the commission of a public offense may be made—

1. By the party about to be injured.
2. By other parties.

See Civ. Code, §§ 23-26; 43-50.

693. Resistance sufficient to prevent the offense may be made by the party about to be injured:

1. To prevent an offense against his person, or his family, or some member thereof.
2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

Subd. 1. Force and resistance.—The right of resistance is based on necessity—27 Cal. 572. It arises where one manifestly intends to commit a felony on the person, habitation, or property of another—9 Iowa, 188; 20 Id. 569; 32 Id. 36; 8 Bush, 481; 23 Ala. 28; 6 Bush, 312; 8 Mich. 150; 18 Ga. 194; 1 Ohio St. 66; Thach. C. C. 471; 3 Wash. C. C. 515; 15 Ohio St. 47. Its rules extend to the relations of parent and child, husband and wife, master and servant, and brother and sister—18 Ga. 704; 17 Ala. 587; 8 Mich. 150; 35 Ind. 492; 56 Id. 123; 30 Miss. 619; 19 Ohio St. 387; 1 Wis. 165. The law of self-defense does not require one to seek the protection of the law—3 Hun, 716; see 71 Ill. 193; 3 Hun, 716; 5 Oreg. 491; 23 N. J. Eq. 251; 65 Me. 426. See *resisting officer*, ante, § 148. See Desty's Crim. Law, § 31 and notes, § 99 g.

Subd. 2. Protection of property.—The law of resistance extends to the defense of the habitation—1 Car. & P. 319; and the owner may use force necessary to repel an assault—8 Cal. 341; Addis. 246. So, an unwelcome visitor may be ejected by force, without calling in a magistrate—45 Barb. 262; 2 Met. 23; 6 Barb. 608; 1 Watts & S. 90; 1 Fost. & F. 416. It extends to the protection of property before taken, but not to its recovery after it is taken, unless it can be retaken without undue violence—11 N. H. 540. Illegal official action may be forcibly resisted—8 Pick. 133; 11 Price, 235; see 123 Mass. 420. See Desty's Crim. Law, 176, and notes.

Resisting trespass.—The owner of property in possession of the same may use as much force as is necessary, to prevent a forcible trespass—8 Cal. 341; but no more force than is necessary—59 Ala. 1; life cannot be taken in resistance of a mere trespass—Id. 2 Halst. 220; 4 Mass. 391; 58 Ga. 35; 23 Ala. 28; 24 Id. 67; and if life be taken, it is

murder or manslaughter, according to the circumstances—4 Mass. 391; 17 Iowa, 133. A bare fear of destruction to property, or of loss of life, or great bodily harm, is not sufficient to justify—43 Cal. 447; 3 Greene, (Iowa) 435; 41 Ga. 527; 42 id. 609; so, when a peaceable trespasser is ordered away and does not go immediately, and the owner kills him, it is murder—10 Cal. 83. A tenant may forcibly prevent a former tenant from removing windows placed by him in a house during his prior tenancy—11 N. H. 540; and see 4 Allen, 318; but a tenant in common cannot remove the agent of his cotenant—4 Allen, 316; nor prevent the removal of his property—4 Cush. 597.

694. Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

CHAPTER II.

OF THE INTERVENTION OF THE OFFICERS OF JUSTICE.

§ 697. Intervention of officers, in what cases.

§ 698. Persons acting in their aid justified.

697. Public offenses may be prevented by the intervention of the officers of justice:

1. By requiring security to keep the peace.
2. By forming a police in cities and towns, and by requiring their attendance in exposed places.
3. By suppressing riots.

Subd. 1. See post, § 706.

Subd. 2. See post, § 720.

Subd. 3. See post, §§ 817, 836-838.

698. When the officers of justice are authorized to act in the prevention of public offenses, other persons, who, by their command, act in their aid, are justified in so doing.

See post, §§ 817, 723, and ante, § 697, note.

CHAPTER III.

SECURITY TO KEEP THE PEACE.

- § 701. Information of threatened offense.
- § 702. Examination of complainant and witnesses.
- § 703. Warrant of arrest.
- § 704. Proceedings on charges being controverted.
- § 705. Person complained of, when to be discharged.
- § 706. Security to keep the peace, when required.
- § 707. Effect of giving or refusing to give security.
- § 708. Person committed for not giving security.
- § 709. Undertaking to be filed in clerk's office.
- § 710. Security required for assault committed in court.
- § 711. Undertaking, when broken.
- § 712. Undertaking, when and how to be prosecuted.
- § 713. Evidence of breach.
- § 714. Security for the peace.

701. An information may be laid before any of the magistrates mentioned in section eight hundred and eight, that a person has threatened to commit an offense against the person or property of another.

Security to keep the peace.—A wife may pray surety of peace against her husband—37 Ind. 353; 24 Ala. 672. A prosecution for surety of peace is a criminal proceeding to prevent, but not to prosecute crime—4 Blackf. 440; 16 Ind. 175; 28 id. 106; 49 id. 341; and when not otherwise provided, the criminal practice act governs—16 id. 175. The constitutional provision as to jeopardy does not apply to this proceeding—28 Ind. 106; id. 141. A complaint is not necessarily bad for alternativeness arising from the use of "or" instead of "and"—8 Ind. 456; 10 id. 170; and see 11 id. 312; 4 id. 561.

702. When the information is laid before such magistrate, he must examine on oath the informer, and any witness he may produce, and must take their depositions in writing, and cause them to be subscribed by the parties making them.

The question to be tried is, has the witness just cause to entertain the fears expressed in his affidavit?—26 Ind. 141. An affidavit of a party who "swears as he verily believes" is good—21 Ind. 225.

703. If it appears from the depositions that there is just reason to fear the commission of the offense threat-

ened, by the person so informed against, the magistrate must issue a warrant, directed generally to the sheriff of the county, or any constable, marshal, or policeman in the State, reciting the substance of the information, and commanding the officer forthwith to arrest the person informed of and bring him before the magistrate.

704. When the person informed against is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto. The evidence must be reduced to writing, and subscribed by the witnesses.

705. If it appears that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged.

Just reason to fear.—The question as to just cause to fear relates to the time of institution of proceedings—35 Ind. 379; 48 Id. 146. The statute gives no right of appeal—18 Ind. 438.

706. If, however, there is just reason to fear the commission of the offense, the person complained of may be required to enter into an undertaking in such sum, not exceeding five thousand dollars, as the magistrate may direct, with one or more sufficient sureties, to keep the peace toward the people of this State, and particularly toward the informer. The undertaking is valid and binding for six months, and may, upon the renewal of the information, be extended for a longer period, or a new undertaking may be required.

707. If the undertaking required by the last section is given, the party informed of must be discharged. If he does not give it, the magistrate must commit him to prison, specifying in the warrant the requirement to give security, the amount thereof, and the omission to give the same.

708. If the person complained of is committed for not giving the undertaking required, he may be discharged by any magistrate, upon giving the same.

709. The undertaking must be filed by the magistrate, in the office of the clerk of the county.

710. A person who, in the presence of a court or magistrate, assaults or threatens to assault another, or to commit an offense against his person or property, or who contends with another with angry words, may be ordered by the court or magistrate to give security, as in this chapter provided, and if he refuse to do so, may be committed as provided in section seven hundred and seven.

711. Upon the conviction of the person informed against of a breach of the peace, the undertaking is broken.

712. Upon the district attorney's producing evidence of such conviction to the Superior Court of the county, the court must order the undertaking to be prosecuted, and the district attorney must thereupon commence an action upon it in the name of the people of this State. [In effect April 12th, 1880.]

713. In the action, the offense stated in the record of conviction must be alleged as a breach of the undertaking, and such record is conclusive evidence of the breach.

714. Security to keep the peace, or be of good behavior, cannot be required except as prescribed in this chapter.

CHAPTER IV.

POLICE IN CITIES AND TOWNS, AND THEIR ATTENDANCE AT
EXPOSED PLACES.

§ 719. Organization and regulation of the police.

§ 720. Force to preserve the peace at public meetings.

719. The organization and regulation of the police, in the cities and towns of this State, is governed by special laws.

720. The mayor or other officer having the direction of the police of a city or town must order a force, sufficient to preserve the peace, to attend any public meeting, when he is satisfied that a breach of the peace is reasonably apprehended.

See *ante*, § 701.

PEN. CODE—35.

CHAPTER V.

SUPPRESSION OF RIOTS.

- § 723. Power of sheriff in overcoming resistance.
- § 724. Officer to certify to court the name of resisters, etc.
- § 725. Governor to order out military to aid in executing process.
- § 726. Magistrates and officers to command rioters to disperse.
- § 727. To arrest rioters if they do not disperse.
- § 728. Officers who may order out the military.
- § 729. Commanding officer and troops to obey the order.
- § 730. Armed force to obey orders of whom.
- § 731. Conduct of the troops.
- § 732. Governor may declare a county in a state of insurrection.
- § 733. May revoke the proclamation.

723. When a sheriff or other public officer authorized to execute process finds, or has reason to apprehend, that resistance will be made to the execution of the process, he may command as many male inhabitants of his county as he may think proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the persons resisting, their aiders and abettors.

Authority to arrest.—The magistrate may not only arrest offenders, but he may authorize others to make the arrest, and may summon all citizens present to come to his aid—4 Pa. L. J. 31; 3 Barn. & Adol. 947; 5 Car. & P. 254; 9 Id. 431; and to refuse to aid an officer in trying to suppress a riot, is an offense—1 Bay, 316; see 9 Mo. 268; Addis. 277; 1 Car. & M. 314. It is the duty of every citizen to endeavor to suppress a riot, and the law will protect them in so doing—1 Yeates, 419; see 3 Pa. L. J. 345; 4 Id. 31. A constable is bound to use his best endeavors to suppress an affray—4 Car. & P. 387; 6 Id. 741; Ryan & M. 132; but he cannot arrest for an affray not done in his presence, without a warrant—same cases. A private person is not justified in arresting an affrayer, unless the affray is still continuing, or is about being renewed—10 Clark & F. 28; S. C. 1 Lead. C. C. 177. Any person may suppress an affray, but he cannot of his own authority arrest after the affray is over—11 Johns. 486. An officer may call on persons to aid him in the execution of his duties—1 Bay. 316; 1 Harg. U. S. Reg. 263; 1 Yeates, 419; 5 Whart. 437; Car. & M. 314. Peace officers—see *post*, § 877. See *ante*, § 697, subd. 3; §§ 701, 720.

724. The officer must certify to the court from which the process issued, the names of the persons resisting, and their aiders and abettors, to the end that they may be proceeded against for their contempt of court.

725. If it appears to the governor that the civil power of any county is not sufficient to enable the sheriff to execute process delivered to him, he must, upon the application of the sheriff of the county, order such portion as shall be sufficient, or the whole, if necessary, of the organized National Guard or enrolled militia of the State, to proceed to the assistance of the sheriff.

726. Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the people of the State, immediately to disperse.

See *ante*, § 697, subd. 3.

727. If the persons assembled do not immediately disperse, such magistrates and officers must arrest them, and to that end may command the aid of all persons present, or within the county.

See *ante*, § 723, and note.

728. When there is an unlawful or riotous assembly with the intent to commit a felony, or to offer violence to person or property, or to resist by force the laws of the State or of the United States, and the fact is made known to the governor, by any justice of the Supreme Court, or the judge of the Superior Court, or sheriff of the county, or the mayor or chief of police of a city, or the president of the board of supervisors of the cities and counties of Sacramento and San Francisco, the governor may issue an order directed to the commanding officer of a division or brigade of the organized National Guard, or enrolled militia of the State, to order his command, or such part thereof as may be necessary, into active service, and to appear at a time and place therein specified, to aid the civil authorities in suppressing violence and enforcing the laws. [In effect April 12th, 1880.]

Governor may call out militia to execute laws, suppress insurrection, and repel invasion—Const. Cal. art. viii, § 1.

729. The organized National Guard or enrolled militia, or such portion thereof as shall be called into active service, as provided in section seven hundred and twenty-eight, must appear at the time and place appointed, fully armed and equipped, and with not less than forty rounds of ball cartridge to each man, if infantry or cavalry, and with not less than twenty rounds of grape, canister, or round shot, if artillery.

730. When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, and is placed under the temporary direction of any civil officer, as provided in section seven hundred and thirty-one, it must obey the orders in relation thereto of such civil officer.

731. Whenever any portion of the National Guard, or enrolled militia, shall have been called into active service to suppress an insurrection or rebellion, to disperse a mob, or to enforce the execution of the laws of this State or of the United States, it shall be competent for the commander-in-chief, or for the general acting in his stead, to place such troops under the temporary direction of the mayor of any city, or of the president of the board of supervisors of the cities and counties of Sacramento and San Francisco, or the person acting in that capacity, of the sheriff of any county, or of any marshal of the United States; and if, in the opinion of such civil officer, it shall become necessary that the troops so called out shall fire or charge upon any mob or body of persons assembled to break or resist the laws, such civil officer shall give a written order to that effect to the superior officer present in command of such troops, who will at once proceed to carry out the order, and shall direct the firing and attack to cease only when such mob or unlawful assembly shall have been dispersed, or when ordered to do so by the proper civil authority. No officer who has been called out to sustain the

civil authorities shall, under any pretense, or in compliance with any order, fire blank cartridges upon any mob or unlawful assemblage, under penalty of being cashiered by sentence of a court-martial; provided, that nothing in this section shall be construed as prohibiting any such troops from firing or charging upon such mob or assembly without the orders of such civil officers, in case they shall first be attacked or fired upon, or forcibly resisted in discharge of their duty. When the commander-in-chief, or general acting in his stead, shall call troops into active service for the purposes mentioned in this section, and shall not place them under the temporary direction of any civil officer, the commanding officer shall use his own discretion with respect to the propriety of attacking or firing upon any mob or unlawful assembly.

Governor as commander-in-chief of militia—Const. Cal. art. v, § 5.

732. When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted, and has not been sufficient to enable the officers having the process to execute it, he may, on the application of the officer, or of the district attorney, or judge of a Superior Court of the county, by proclamation, published in such papers as he may direct, declare the county to be in a state of insurrection, and may order into the service of the State such number and description of the organized National Guard, or volunteer uniformed companies, or other militia of the State, as he deems necessary, to serve for such term and under the command of such officer as he may direct. [In effect April 12th, 1880.]

733. The governor may, when he thinks proper, revoke the proclamation authorized by the last section, or declare that it shall cease at the time and in the manner directed by him.

See Const. Cal. art. v, § 5.

TITLE II.

Of Judicial Proceedings for the Removal of Public Officers by Impeachment or otherwise.

CHAP. I. OF IMPEACHMENTS, §§ 737-53.

II. OF THE REMOVAL OF CIVIL OFFICERS OTHERWISE THAN BY IMPEACHMENT, §§ 758-72.

CHAPTER I.

OF IMPEACHMENTS.

- § 737. Officers liable to impeachment.
- § 738. Articles, how prepared. Trial by Senate.
- § 739. Articles of impeachment.
- § 740. Time of hearing. Service on defendant.
- § 741. Service, how made.
- § 742. Proceedings on failure to appear.
- § 743. Defendant, after appearance, may answer or demur.
- § 744. If demurrer is overruled, defendant must answer.
- § 745. Senate to be sworn.
- § 746. Two-thirds necessary to a conviction.
- § 747. Judgment on conviction, how pronounced.
- § 748. The same.
- § 749. Nature of the judgment.
- § 750. Effect of judgment of suspension.
- § 751. Impeachment disqualifies until acquittal, Vacancy, how filled.
- § 752. Presiding officer when lieutenant-governor is impeached.
- § 753. Impeachment not a bar to indictment.

737. The governor, lieutenant-governor, secretary of state, controller, treasurer, attorney-general, surveyor-general, chief justice, associate justices of the Supreme Court, and judges of the Superior Courts, are liable to impeachment for any misdemeanor in office. [In effect February 18th, 1880.]

Impeachment, who subject to—Const. Cal. art. iv, § 18. While the Constitution has provided for the impeachment of certain officers, it has left all other civil officers to be tried in such manner as the Legislature may provide—45 Cal. 200. A presiding judge is liable for preventing his associate from delivering his opinion—Addison's Trial, 114, 151; S. C. 4 Dall. 225; Porter's Trial, 61. Judges cannot be removed by *quo warranto*—43 Ala. 234.

738. All impeachments must be by resolution adopted, originated in, and conducted by managers elected by the Assembly, who must prepare articles of impeachment, present them at the bar of the Senate, and prosecute the same. The trial must be had before the Senate, sitting as a court of impeachment.

The trial.—A member of the House, voting for the prosecution of an impeachment, is not thereby rendered disqualified, if subsequently elected to the Senate, from sitting on the trial thereof—Addison's Trial, 21-8; Porter's Trial, 53. For an impeachment to be effectual, the articles must be presented to the Senate, and a constitutional quorum of the entire membership must receive them—12 Fla. 653. See Const. Cal. art. iv, § 17; Fed. Const. art. i, § 3, subd. 6.

739. When an officer is impeached by the Assembly for a misdemeanor in office, the articles of impeachment must be delivered to the president of the Senate.

740. The Senate must assign a day for the hearing of the impeachment, and inform the Assembly thereof. The president of the Senate must cause a copy of the articles of impeachment, with a notice to appear and answer the same at the time and place appointed, to be served on the defendant not less than ten days before the day fixed for the hearing.

741. The service must be made upon the defendant personally, or if he cannot, upon diligent inquiry, be found within the State, the Senate, upon proof of that fact, may order publication to be made, in such manner as it may deem proper, of a notice requiring him to appear at a specified time and place and answer the articles of impeachment.

See Pol. Code, § 259.

742. If the defendant does not appear, the Senate, upon proof of service or publication, as provided in the two last sections, may, of its own motion or for cause shown, assign another day for hearing the impeachment, or may proceed, in the absence of the defendant, to trial and judgment.

See 55 Cal. 290.

743. When the defendant appears, he may in writing object to the sufficiency of the articles of impeachment, or he may answer the same by an oral plea of not guilty, which plea must be entered upon the journal, and puts in issue every material allegation of the articles of impeachment.

744. If the objection to the sufficiency of the articles of impeachment is not sustained by a majority of the members of the Senate who heard the argument, the defendant must be ordered forthwith to answer the articles of impeachment. If he then pleads guilty, or refuses to plead, the Senate must render judgment of conviction against him. If he plead not guilty, the Senate must, at such time as it may appoint, proceed to try the impeachment.

745. At the time and place appointed, and before the Senate proceeds to act on the impeachment, the secretary must administer to the president of the Senate, and the president of the Senate to each of the members of the Senate then present, an oath truly and impartially to hear, try, and determine the impeachment; and no member of the Senate can act or vote upon the impeachment, or upon any question arising thereon, without having taken such oath.

Form of oath—Chase's Trial, 12.

746. The defendant cannot be convicted on impeachment without the concurrence of two-thirds of the members elected, voting by ayes and noes, and if two-thirds of the members elected do not concur in a conviction, he must be acquitted. [In effect February 18th, 1880.]

747. After conviction the Senate must, at such time as it may appoint, pronounce judgment, in the form of a resolution entered upon the journals of the Senate.

748. On the adoption of the resolution by a majority of the members present who voted on the question of acquittal or conviction, it becomes the judgment of the Senate.

749. The judgment may be that the defendant be suspended, or that he be removed from office and disqualified to hold any office of honor, trust, or profit, under the State. [In effect February 18th, 1880.]

A removal from office for an offense committed is a part of the judgment.—1 Leg. Gaz. 455. See Const. Cal. art. iv, § 18.

750. If judgment of suspension is given, the defendant, during the continuance thereof, is disqualified from receiving the salary, fees, or emoluments of the office.

751. Whenever articles of impeachment against any officer subject to impeachment are presented to the Senate, such officer is temporarily suspended from his office, and cannot act in his official capacity until he is acquitted. Upon such suspension of any officer other than the governor, his office must at once be temporarily filled by an appointment made by the governor, with the advice and consent of the Senate, until the acquittal of the party impeached; or, in case of his removal, until the vacancy is filled at the next election, as required by law.

All the functions of the governor are entirely suspended during his trial—3 Neb. 464.

752. If the lieutenant-governor is impeached, notice of the impeachment must be immediately given to the Senate by the Assembly, that another president may be chosen.

753. If the offense for which the defendant is convicted on impeachment is also the subject of an indictment or information, the indictment or information is not barred thereby. [In effect February 18th, 1880.]

CHAPTER II.

OF THE REMOVAL OF CIVIL OFFICERS OTHERWISE THAN
BY IMPEACHMENT.

- § 758. Accusation to be presented by the grand jury.
- § 759. Form of accusation.
- § 760. To be transmitted to the district attorney, and copy served.
- § 761. Proceedings if defendant does not appear.
- § 762. Defendant may object to or deny the accusation.
- § 763. Form of objection.
- § 764. Manner of denial.
- § 765. If objections overruled, defendant must answer.
- § 766. Proceedings on plea of guilty, refusal to answer, etc.
- § 767. Trial by jury.
- § 768. State and defendant entitled to process for witnesses.
- § 769. Judgment upon conviction, and its form.
- § 770. Appeal, how taken. Defendant to be suspended and vacancy filled.
- § 771. Proceedings for the removal of a district attorney.
- § 772. Removal of public officers by summary proceedings.

758. An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed.

Removal from office.—The power to remove is an incident of the power to appoint, and is made so expressly by the Constitution—7 Cal. 162; id. 522; 14 id. 715; 39 Cal. 3; but it is limited to those officers whose term is not provided for by the Constitution—2 Cal. 198; 6 id. 291; 7 id. 519; see 8 B. Mon. 649; or declared by law—6 Cal. 291. So a constitutional officer cannot be divested of his office otherwise than as prescribed by the Constitution—2 Cal. 198; 7 id. 519. The governor cannot remove a notary public before his whole term of office has expired 6 Cal. 291; but an *ex-officio* tax-collector may be deprived of his office before the expiration of his term—14 Cal. 12; see 38 id. 76. The Legislature can abolish an office, or extend and abridge the term, at pleasure—45 Cal. 553. See 38 Cal. 12.

Form of information and decree—see 1 Allen, 358.

759. The accusation must state the offense charged, in ordinary and concise language, and without repetition.

760. The accusation must be delivered by the foreman of the grand jury to the district attorney of the county, except when he is the officer accused, who must cause a copy thereof to be served upon the defendant, and require, by notice in writing of not less than ten days, that he appear before the Superior Court of the county, at a time mentioned in the notice, and answer the accusation. The original accusation must then be filed with the clerk of the court. [In effect April 12th, 1880.]

761. The defendant must appear at the time appointed in the notice and answer the accusation, unless for some sufficient cause the court assign another day for that purpose. If he does not appear, the court may proceed to hear and determine the accusation in his absence.

See 55 Cal. 290.

762. The defendant may answer the accusation either by objecting to the sufficiency thereof, or of any article therein, or by denying the truth of the same.

763. If he objects to the legal sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection.

764. If he denies the truth of the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

765. If an objection to the sufficiency of the accusation is not sustained, the defendant must answer thereto forthwith.

766. If the defendant pleads guilty, or refuses to answer the accusation, the court must render judgment of conviction against him. If he denies the matters charged, the court must immediately, or at such time as it may appoint, proceed to try the accusation.

767. The trial must be by a jury, and conducted in all respects in the same manner as the trial of an indictment for a misdemeanor.

768. The district attorney and the defendant are respectively entitled to such process as may be necessary to enforce the attendance of witnesses, as upon a trial of an indictment.

769. Upon a conviction, the court must, at such time as it may appoint, pronounce judgment that the defendant be removed from office; but, to warrant a removal, the judgment must be entered upon the minutes, and the causes of removal must be assigned therein.

770. From a judgment of removal an appeal may be taken to the Supreme Court, in the same manner as from a judgment in a civil action; but until such judgment is reversed, the defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy.

771. The same proceedings may be had on like grounds for the removal of a district attorney, except that the accusation must be delivered by the foreman of the grand jury to the clerk, and by him to a judge of the Superior Court of the county, who must thereupon appoint some one to act as prosecuting officer in the matter, or place the accusation in the hands of the district attorney of an adjoining county, and require him to conduct the proceedings. [In effect April 12th, 1880.]

772. When an accusation in writing, verified by the oath of any person, is presented to a Superior Court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered, or to be rendered, in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented; and on that day, or some other subsequent day not more than twenty days from that on which the accusation was presented, must proceed to hear, in a sum-

CHAPTER I.

OF THE LOCAL JURISDICTION OF PUBLIC OFFENSES.

- § 777. Jurisdiction of offenses committed in this State.
- § 778. Offenses commenced without, but consummated within this State.
- § 779. When an inhabitant of this State is concerned in a duel out of the same, and a party wounded dies therein.
- § 780. Leaving the State to evade the statute against dueling.
- § 781. Offense committed partly in one county and partly in another.
- § 782. Committed on the boundary, etc., of two or more counties.
- § 783. Jurisdiction of an offense on board a vessel or car.
- § 784. Jurisdiction for kidnapping or abduction.
- § 785. Jurisdiction of an indictment for bigamy or incest.
- § 786. Property feloniously taken in one county and brought into another.
- § 787. Jurisdiction for escaping from prison.
- § 788. Jurisdiction for treason committed out of the State.
- § 789. Jurisdiction for stealing, etc., property, out of State, and brought therein.
- § 790. Jurisdiction for murder, etc., where the injury was inflicted in one county, and the party dies out of that county.
- § 791. Of an indictment against an accessory.
- § 792. Of principals who are not present, etc., at commission of the principal offense.
- § 793. Conviction or acquittal in another State a bar, where the jurisdiction is concurrent.
- § 794. Conviction or acquittal in another county a bar, where the jurisdiction is concurrent.
- § 795. Jurisdiction of prize-fight.

777. Every person is liable to punishment by the laws of this State, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States.

Jurisdiction generally.—State tribunals have no power to punish crimes against the laws of the United States as such; as in false swearing before register of land-office—38 Cal. 150; 4 Blackf. 147; or under the national bankrupt act—15 N. H. 83; but see 108 Mass. 309. It is only when an offense is also an offense against the State laws that State tribunals have jurisdiction—38 Cal. 150; and see 54 Me. 381. So, there

is a distinction between counterfeiting and circulating counterfeit coin—10 Law Reporter, 500. The former is an offense directly against the government; the latter is an offense against the State, and may be punished by the laws of the State—34 Cal. 183; 5 How. 410; 10 id. 560; 1 Doug. (Mich.) 207; 3 Head. 26; 2 Tread. 776; 2 Law Reporter, 92; but see 3 Mo. 421; and dis. opin. 5 How. 433. Exclusive jurisdiction is uniformly attendant upon exclusive legislation—2 Mason, 91; and see 34 Cal. 183; 9 Peters, 261; 5 How. 410; 14 id. 14. That the defendant will be liable to prosecution in the courts of the United States will not exclude jurisdiction in State courts—6 Ind. 436; so, State courts have power to try for murder a soldier in the military service of the United States—6 Parker Cr. R. 143. Congress cannot confer jurisdiction on State courts, and States have no power to make offenses against the United States laws cognizable in their courts—34 Cal. 280; nor can Congress confer on United States courts jurisdiction to try indictments found in State courts—5 Parker Cr. R. 577. The authority of Congress is limited to subjects peculiar to the Federal government—1 Woolw. 17. So, robbery committed on land is not punishable by any act of Congress—Hemp. 411; State tribunals have no jurisdiction to grant relief on the unlawful imprisonment of a United States officer—5 Dutch. 409; or on *habeas corpus*, to take a person out of the hands of a United States officer—40 Barb. 34. When jurisdiction is wholly derived from the statute, it cannot be enlarged by presumption or by implication—49 Me. 412. See Const. Prov. *ante*, page 20.

Cannot be conferred by consent.—Consent cannot confer jurisdiction to try a party for any other offense than that charged in the indictment—50 Cal. 448; 4 Parker Cr. R. 386. A party may waive objections to the jurisdiction in a criminal case—5 Hun. 308; so, where a party voluntarily submits to the jurisdiction, judgment will not be reversed—49 Mo. 432. So, where a conviction was had before a *de facto* judge, his acts are valid—17 Wis. 521; so, the casual and temporary absence of one of the judges does not impair the validity of the proceedings—36 N. Y. 431.

Appellate jurisdiction.—If the constitution confers appellate jurisdiction, and no mode is provided for taking the appeal, the case may be brought up on a writ of error, or the court may frame an appropriate writ—52 Cal. 220; 5 id. 190; 3 id. 247; 24 id. 334. It attaches in criminal cases on questions of law alone—2 La. An. 221; 9 id. 24; and not until after sentence or judgment—1 d. 69; 1 d. 157; 18 id. 340; 22 id. 9. The Supreme Court has not jurisdiction of a criminal case involving the validity of a tax, etc.—30 Cal. 98; nor has it of a lesser grade of offense than felony—7 Cal. 139; 1 d. 165; 5 id. 295; 9 id. 86; 16 id. 187; 20 Cal. 117; 29 id. 459; 30 id. 98; 31 id. 565. There is an absolute right of appeal from the Municipal Criminal Court to the County Court when the mode and means of appeal are provided—41 Cal. 129. The State, in a criminal case before a justice of the peace, has a right of appeal as well as the defendant—22 Iowa, 140. See Const. Prov. *ante*, page 20.

Power of Legislature.—The Legislature may establish criminal courts in addition to those specified in the Constitution, and give them concurrent jurisdiction—69 Pa. St. 9; 44 Tex. 64; or it may establish special courts in cities and towns—76 N. C. 33; 65 id. 379; 66 id. 313. So, the Municipal Criminal Court of San Francisco is a constitutional court—39 Cal. 517; 41 id. 129. See Const. Prov. *ante*, page 19.

Courts generally.—District Courts have jurisdiction over punishments for extortion in office—45 Cal. 200. See generally Const. Cal. art. vi. County Courts are courts of general jurisdiction, and all intendments are in favor of their proceedings—27 Cal. 65; 41 id. 129. In all cases of misdemeanor its judgment is final except in cases of excess of jurisdiction—29 Cal. 459; 30 id. 98. A Justice's Court has no extra territorial jurisdiction—4 Nev. 412. The repeal of a criminal law does not operate to bar the punishment of an offense under the law unless

the intention be expressly declared in the repealing act—18 Cal. 122. The Police Court of San Francisco has the same powers and jurisdiction in criminal actions as is conferred on Justices' Courts—47 Cal. 127.

Offenses by resident aliens.—A resident alien is amenable to the law of the place in which he lives, even in cases of treason—5 Wheat. 97; Whart. St. Tr. 93; id. 185; 10 Cox C. C. 603; so as to resident Indians—27 Cal. 404; 6 Peters, 518; 3 Wall. 407; 1 McLean, 254; 4 Kan. 49; 16 Ark. 499; 1 Stewt. & P. 327; 1 Abb. U. S. 377; 1 Woolw. 192; 64 N. C. 614; 3 Yerg. 256; 1 Abb. U. S. 377.

778. When the commission of a public offense, commenced without the State, is consummated within its boundaries, the defendant is liable to punishment therefor in this State, though he was out of the State at the time of the commission of the offense charged. If he consummated it in this State, through the intervention of an innocent or guilty agent, or any other means proceeding directly from himself, in such case the jurisdiction is in the county in which the offense is consummated.

Offenses committed abroad.—A person is responsible penally when he is abroad, to both the Federal and his State government—101 Mass. 1; 2 Va. Cas. 172; 3 Dutch. 301; 16 Wis. 398; but see as to extra-territorial jurisdiction of State—8 Mich. 320; 2 Hayw. 109; and see 2 Parker Cr. R. 590. As to consuls and ministers resident abroad—11 Blatchf. 124; but it is limited to persons owing allegiance to the United States—11 Opin. Att.-Gen. 474; as in cases of perjury—2 Pa. St. 20; 41 id. 429; or bigamy committed abroad—7 Cox C. C. 103; Dears. 647; see 1 Hun. 610; 32 Ark. 565; 55 Ala. 108. So as to forgery committed abroad, the offense may be charged in any county into which the offender may come—7 Car. & P. 558; Russ. & R. C. C. 112. So in cases of murder—Russ. & R. C. C. 294; 1 Car. & K. 203; 11 Cox C. C. 198.

Offenses committed out of the State.—Where an offense was committed by procurement of a resident of another State, the non-resident can be punished if jurisdiction can be obtained of his person—34 Conn. 118; *contra*, 31 N. J. L. 65. So, inciting an agent in another country to commit perjury—11 Allen, 243; or giving poison in one jurisdiction which operates in another—8 Ohio St. 131; or where a party originates a nuisance in one country, which affects a stream in another—3 Wood & M. 538; see 4 Barn. & Ald. 175; or where a person shoots from one side of a boundary line, and it takes effect on the other side, he is responsible in the jurisdiction where the effect is produced—2 Sum. 482; 31 N. J. L. 68; 101 Mass. 1; and see generally—34 Conn. 118; 4 East, 164. So where a marriage was solemnized in the middle of a river between two States, the offense is cognizable in the latter State, the former not claiming jurisdiction—2 Met. (Ky.) 394.

Liability of principal.—A non-resident principal is penally liable for acts committed by his agent, as in obtaining goods by false pretenses—1 N. Y. 173; 31 N. J. L. 69; 3 Denio, 190; 1 Met. (Ky.) 1; 6 Cox C. C. 260; 4 id. 198; so, as to the author of a libel—3 Pick. 304; 7 East, 65; or a thief sending stolen goods to another State for sale—123 Mass. 430; or sending lottery tickets for sale—7 Serg. & R. 469.

779. When an inhabitant or resident of this State, by previous appointment or engagement, fights a duel or is

concerned as second therein, out of the jurisdiction of this State, and in the duel a wound is inflicted upon a person, whereof he dies in this State, the jurisdiction of the offense is in the county where the death happens.

780. When an inhabitant of this State leaves the same for the purpose of evading the operation of the provisions of the Code relating to dueling and challenges to fight, with the intent or for the purpose of doing any of the acts prohibited therein, the jurisdiction is in the county of which the offender was an inhabitant when the offense was committed.

Dueling and challenges.—Sending a challenge to fight out of the State is indictable—Thatch. C. C. 390; 3 Brev. 243; 1 Const. S. C. 106; 1 Hawks, 437. The offense is continuous, and is triable in the State where the challenge issued—58 Ga. 332; 1 Hawks, 487; 2 Camp. 506; see 12 Ala. 276; and this, whether it reaches its destination or not—2 Camp. 506.

781. When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county.

Concurrent jurisdiction.—The place of trial is the place of the consummation of the offense—2 Barb. 427; 3 Pick. 304; 21 Wend. 533; 7 Serg. & R. 469; though a concurrent jurisdiction exists in the place of commencing the offense—2 Dall. 388; 19 Ind. 421; 17 Ark. 561; 1 Camp. 215; 2 id. 506; 2 Lew. C. C. 150; but attempts to commit crime are cognizable in the place of the attempt—26 Ga. 493; see 9 Cox C. C. 497; and so in case of conspiracies—1 Salk. 174; 2 Ld. Raym. 1167; 4 Fost. & F. 63; or in the place where an act was done by any of them in furtherance of their design—3 Brewst. 575; 2 Stark. 439; any overt act by any of the conspirators being a renewal of the conspiracy by all—123 Mass. 430; 3 Brewst. 575; 48 Md. 321; 19 Ind. 421; 17 Ark. 561; 13 Nev. 336; 11 Blatchf. 168; 7 Bliss. 175; 29 La. An. 354; 54 Ala. 234; 52 id. 407; 83 Ill. 291; 3 Serg. & R. 220. As where one signals in one county for a robbery in another county—13 Nev. 336. The place of consummation is the peculiar seat of the crime in libel—7 Ben. 1; and in obtaining money by false pretenses—51 Ind. 413; see 1 Denison, 551. See as to "Arson," 44 Cal. 495. If a party in one county, intrusted with property of the owner, afterward takes it to another county, he is not liable in the former county, unless the intent to embezzle was conceived there—51 Cal. 378. See EMBEZZLEMENT, *ante*, § 503.

782. When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county.

Boundary line.—A crime is perpetrated on the boundary between, if perpetrated within five hundred yards thereof—36 N. Y. 77. See as to "Arson," 44 Cal. 495.

783. When an offense is committed in this State, on board a vessel navigating a river, bay, slough, lake, or canal, or lying therein, in the prosecution of her voyage, the jurisdiction is in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage terminates; and when the offense is committed in this State, on a railroad train or car prosecuting its trip, the jurisdiction is in any county through which the train or car passes in the course of her trip, or in the county where the trip terminates. [Approved January 28th, 1876.]

Offenses on board vessels.—Congress cannot confer jurisdiction on State courts, yet State courts may exercise jurisdiction in cases authorized by its laws, and not prohibited by congressional legislation—5 Wheat. 27; 9 Law Reporter, 295; see 18 Peters, 639; id. 630. As a rule offenses committed on shipboard are cognizable by the sovereign to whom the ship belongs—7 Cox C. C. 431; and by statutes of the United States the Federal courts have jurisdiction of all offenses committed on the high seas, or in any place out of the jurisdiction of a State—3 Blatchf. 6; 1 Cranch, 373; 1 Wash. C. C. 463; 1 Sum. 168; as in an open roadstead in a foreign country—5 Wheat. 184; 5 Blatchf. 18. The local jurisdiction of a State extends to the distance of a cannon-shot from low-water mark—7 N. Y. 295; see 12 Met. 387. A vessel is subject to the laws and control of a country it visits; 7 Mich. 161; 8 id. 329; 13 Wall. 486; 8 C. 2 Green Cr. R. 134. Without a special statute jurisdiction over injuries upon the high seas does not exist in the Federal courts—4 Dall. 427; 1 Wash. C. C. 463; 2 Curt. 446; nor in the courts of a State—27 N. J. L. 499; 2 Va. Cas. 205. See 26 Miss. 51; 23 Miss. 664. Where a crime was committed on a canal-boat, it must be alleged and proved that the boat had passed through some part of the county in which the indictment is found—61 Barb. 226. Where waters where the tide ebbs and flows are inclosed by a range of islands and the main shore, they are within the county—3 Parker Cr. R. 199. "Or lying therein in the prosecution of her voyage," construed—3 Hill, 309.

784. The jurisdiction of a criminal action—

1. For forcibly and without lawful authority seizing and confining another, or inveigling or kidnapping him, with intent, against his will, to cause him to be secretly confined or imprisoned in this State, or to be sent out of the State, or from one county to another, or to be sold as a slave, or in any way held to service; or,

2. For decoying, taking, or enticing away a child under the age of twelve years, with intent to detain and conceal it from its parent, guardian, or other person having the lawful charge of the child; or,

3. For inveigling, enticing, or taking away an unmar-

ried female of previous chaste character, under the age of twenty-five years, for the purpose of prostitution; or,

4. For taking away any female, under the age of sixteen years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, either for the purpose of concubinage or prostitution;

—is in the county in which the offense is committed, or out of which the person upon whom the offense was committed may, in the commission of the offense, have been brought, or in which an act was done by the defendant in instigating, procuring, promoting, or aiding in the commission of the offense, or in abetting the parties concerned therein. [In effect April 9th, 1880.]

Subd. 1. See *ante*, § 207.

Subd. 2. See *ante*, §§ 266, 267, 278.

Subd. 3. See *ante*, §§ 266, 267, 278.

785. When the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county.

786. When property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county. But if at any time before the conviction of the defendant in the latter, he is indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the sheriff of the former.

Property brought into another county.—This section authorizes a trial in the county to which the property is brought, when the property "has been taken by larceny" in another county—6 Pac. C. L. J. 561; but it cannot be said that a thief commits a new larceny in every county through which he passes with the stolen property—6 id. 561. Whenever an offense is begun in one county and completed in another, the venue may be laid in either; so, larceny is punishable in any county in which the goods are brought—40 Cal. 648; 43 Ill. 397; 39 Ala. 684; 17 Mo. 211; 21 id. 14; 49 id. 181; 11 Cush. 483; 7 Met. 475; 9 id. 128; 10 Mass. 154; 16 N. Y. 344; 4 Parker Cr. R. 255; 11 Wend. 129; 2 Leigh. 708; 11 Mich. 329; 7 Cold. 331; 47 Miss. 671; 8 Nev. 208; so, as to embezzlement—61 Barb. 226; 11 Wend. 129; 40 Ala. 44; 3 Stewt. 123; 4 Kan. 68; 1 Har. & J. 340; 12 Mo. 453; 35 Mo. 229; 2 Denison, 298; Russ. & R. C. C. 56; 3 Bos. & P. 596; but see 100 Mass. 1; but mere reception of the property does not give jurisdiction—51 Cal. 378, without proof of the asportation—22 Minn. 76. The rule is otherwise at common law—14 Cox C. C. 22. See 3 Gray, 434; 9 Wend. 505.

787. The jurisdiction of a criminal action for escaping from prison is in any county of the State. In effect April 9th, 1880.]

788. The jurisdiction of a criminal action for treason, when the overt act is committed out of the State, is in any county of the State. [In effect April 9th, 1880.]

789. The jurisdiction of a criminal action for stealing in any other State the property of another, or receiving it, knowing it to have been stolen, and bringing the same into this State, is in any county into or through which such stolen property has been brought. [In effect April 9th, 1880.]

Larceny in other State.—As between the several States, jurisdiction exists at common law in the State into which the stolen property is brought—1 Mass. 116; 3 Stewt. 123; 2 Mass. 14; 9 Gray, 7; 1 Duval, 153; 1 Hayw. 100; 1 Har. & J. 340; 3 Conn. 186; 24 Mich. 156; 36 Miss. 593; 26 Ill. 173; 35 Mo. 229; 9 Nev. 48; 14 Iowa, 479; 2 Oreg. 115; 11 Ohio, 435; 24 Ohio St. 166. And in some States it is held not to exist without a statute—5 Binn. 619; 14 La. An. 278; 2 Johns. 477; id. 479; 31 N. J. L. 82; 1 Neb. 11; and such statutes are constitutional—4 Humph. 461; 15 Ind. 378; 67 Mo. 59; but see 49 id. 181; 3 Grey, 434. See *ante*, § 497, and notes.

790. The jurisdiction of a criminal action for murder or manslaughter, when the injury which caused the death was inflicted in one county, and the party injured dies in another county or out of the State, is in the county where the injury was inflicted. [In effect April 9th, 1880.]

Consummation out of State.—Where a person assaulted in one State went to another State and died there, the charge is not cognizable in the courts of the latter State—3 Dutch, 499; see 7 Mich. 161.

791. In the case of an accessory in the commission of a public offense, the jurisdiction is in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county.

The act of Congress punishing for murder does not embrace an accessory before the fact—Hemp. 481; but see 2 Blatchf. 207. A person who, out of the State, becomes an accessory before the fact to a felony committed within the State, cannot be punished by the laws of Indiana—19 Ind. 421. See *ante*, §§ 31, 32, and notes.

792. The jurisdiction of a criminal action against a principal in the commission of a public offense, when

such principal is not present at the commission of the principal offense, is in the same county it would be under this Code if he were so present and aiding and abetting therein. [In effect April 9th, 1880.]

793. When an act charged as a public offense is within the jurisdiction of another State or country, as well as of this State, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this State.

Bar to prosecution.—The district in which the trial is had must have been ascertained before the commission of the crime—5 Blatchf. 368. Where an offense is committed against two sovereignties, the first one prosecuting absorbs it—97 U. S. 309. It is no defense that the parties were wrongfully arrested in one State and taken to another—21 Iowa, 467; see 5 Parker Cr. E. 507.

794. When an offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment therefor in another.

Trial as a bar.—A trial in one county is a bar to a trial in every other county—43 Ill. 397; 39 Ala. 664; 7 Cold. 331.

795. The jurisdiction of a violation of sections four hundred and twelve, four hundred and thirteen, and four hundred and fourteen of the Penal Code, or a conspiracy to violate either of said sections, is in any county, first, in which any act is done toward the commission of the offense; or, second, into, out of, or through which the offender passed to commit the offense; or, third, where the offender is arrested. [Approved March 7th, 1874.]

CHAPTER II.

OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

- § 799. Prosecution for murder may be commenced at any time.
- § 800. Limitation of three years in all other felonies.
- § 801. Limitation of one year in misdemeanors.
- § 802. Exception when defendant is out of the State.
- § 803. Indictment found, when presented and filed.

799. There is no limitation of time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed.

Statute of limitations applies to offenses perpetrated before its passage as well as to subsequent offenses—3 McLean, 89; id. 469; 2 Cranch, 342; 5 Cranch C. C. 73; 2 Pars. Cas. 453; and to common-law offenses—1 Cranch C. C. 485; 2 id. 60; 3 id. 442; *contra*, 24 Tex. 61; but if it extends the time for finding an indictment, it does not apply to previous crimes—58 N. Y. 303; 57 id. 473; 55 id. 93; id. 495; id. 613; 49 N. Y. 332; 47 id. 566; 28 id. 400; 25 id. 406; 24 id. 20; 6 id. 463; 49 Barb. 181. The statute begins to run on the day of committing the offense—26 Tex. 82. In bigamy, it runs from the bigamous marriage, unless the statutes make the crime continuous—81 Pa. St. 428; 32 Ark. 205. Continuous withholding of property is not a continuous offense—98 U. S. 450. There is no limitation within which to prosecute for murder—44 Cal. 99.

800. An indictment for any other felony than murder must be found, or an information filed, within three years after its commission. [In effect April 9th, 1880.]

See 12 Cal. 294; 44 id. 99.

801. An indictment for any misdemeanor must be found, or an information filed, within one year after its commission. [In effect April 9th, 1880.]

802. If, when the offense is committed, the defendant is out of the State, the indictment may be found or an information filed within the term herein limited after his coming within the State, and no time during which the defendant is not an inhabitant of, or usually resident within this State, is part of the limitation. [In effect April 9th, 1880.]

Absence from State.—The time that the defendant may be out of the State is no part of the limitation—18 Cal. 38. So, flight or concealment suspends the running of the statute—5 Cranch C. C. 39; id. 116; 57 Ind. 113; 4 Day, 123; it need not be specially pleaded—17 Wall. 168; 4 Day, 123; 3 Cranch C. C. 441; 5 id. 73; 2 Low. 267; 29 N. H. 274; 28 Pa. St. 259; *contra*, 5 Parker Cr. R. 231; 74 N. C. 230; 4 Ga. 335; 10 Humph. 52; 8 Ind. 494; 7 Iowa, 409. It devolves on the prosecution to show the offense within the statutory period—12 Cal. 295; 181d. 38; 1 Stewt. 318; 1 Stewt. & P. 208; 4 Day, 121; 28 Pa. St. 259; Russ. & R. C. C. 369; but the prosecution may prove, without averring it, that defendant is within the statute—17 Wall. 168; 3 McLean, 469; and see 5 Cranch C. C. 73; 39 Me. 212; 9 Cowen, 655; 2 Pars. Cas. 453; 10 Humph. 52; 8 Blackf. 135.

803. An indictment is found within the meaning of this chapter, when it is presented by the grand jury in open court, and there received and filed.

When ceases to run.—After commencement of legal proceedings the statute remains silent till final judgment on the merits—3 Brewst. 394; 5 Jones, (N. C.) 221; 6 id. 42; 38 Ala. 425; and dismissal of the action does not revive it—13 Bush, 142. Though indictment must be found to prevent the bar of the statute, sentence need not be within the limitation—3 Brewst. 394.

PEN. CODE.—§ 7.

CHAPTER III.

THE INFORMATION.

- § 806. Complaint defined.
- § 807. Magistrate defined.
- § 808. Who are magistrates.
- § 809. Filing information.

806. The complaint is the allegation in writing made to a court or magistrate that a person has been guilty of some designated offense. [In effect April 9th, 1880.]

Prosecutions in Federal courts.—The limitation in the Federal Constitution, of prosecutions to indictments by the grand jury, applies to Federal prosecutions—24 Ala. 672; 1 Rich. 85; 30 Wis. 129; 6 Vt. 57. See Const. U. S. Amdt. art. v. But crimes against the elective franchise can be prosecuted by information—see Rev. Stat. U. S. § 1022; or for misdemeanors which do not preclude the person convicted from being a witness—1 Gall. 3; 1 Cent. L. J. 205; 1 Sawy. 701; 17 Wall. 496; 18 id. 125. See 13 Wall. 531; 3 Dill. 275; 15 Bank. Reg. 325. As for violation of the revenue law—21 Int. Rev. Rec. 148. Severity of punishment does not, by itself, make a crime infamous—9 Cowen, 707; 3 Watts & S. 338; 1 Moody C. C. 34.

Prosecution in State courts.—The Code authorizes a proceeding by information only when a defendant has been examined and committed—6 Pac. C. L. J. 526. Where, after conviction upon information for grand larceny, a motion in arrest of judgment was made on the ground that the court had no jurisdiction to try the offense without an indictment, *held*, properly denied—6 Pac. C. L. J. 819. Where an act reduces a felony to a misdemeanor by a repeal, notwithstanding such repeal a prosecution under it may be maintained in accordance with § 329 of the Political Code, but it must be by indictment and not by information—6 Pac. C. L. J. 727.

Extortion in office.—Any private citizen may make the complaint against an officer—45 Cal. 216. See 43 Cal. 223; see *ante*, § 701. The proceeding by information is opposed to neither the Constitution of the United States nor of this State—6 Pac. C. L. J. 528.

807. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense.

808. The following persons are magistrates:

1. The justices of the Supreme Court.
2. The judges of the Superior Courts.
3. Justices of the peace.

4. Police magistrates in towns or cities. [In effect March 12th, 1880.]

Subd. 2. See 51 Cal. 376.

Subd. 4. See 39 Cal. 706.

809. When a defendant has been examined and committed, as provided in section eight hundred and seventy-two of this Code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the Superior Court of the county in which the offense is triable, an information charging the defendant with such offense. The information shall be in the name of the People of the State of California, and subscribed by the district attorney, and shall be in form like an indictment for the same offense. [In effect April 9th, 1880.]

The information.—So far as its structure is concerned, the same rules apply as in case of an indictment—58 Ala. 365; 30 La. An. 557; 6 Tex. Ct. App. 202; id. 244; Law R. 2 Q. B. 40. The same certainty is required in charging offenses as in an indictment—10 Ind. 404; 14 id. 425; 23 id. 61; 35 id. 419; 51 id. 111; and it must contain all the substantial requirements of an indictment—7 Ind. 654; 4 id. 577. An information will lie, at common law, for an exhibition which tends to corrupt morals or shock humanity—3 Day, 103; and it must state acts of indecency or immorality—id. If it is for an offense created by statute, it is sufficient if it is in the language of the statute—14 Conn. 487. An information for being a common cheat must state particular acts—1 Chip. (Vt.) 129. If it be for a first offense, it need not allege that it is for a first offense—9 Conn. 500. If for additional punishment, it should aver previous convictions—2 Met. 408. It is sufficient to allege that the convict had been discharged by a pardon—3 Met. 403; but see 2 id. 408. It need not allege that he informs under his official oath—Brayl. 132; but where it charged that he verily believed defendant committed the offense, it was held bad on motion to quash—31 Ind. 210. The prosecuting attorney is alone authorized to amend—12 Conn. 101; 29 id. 463; 38 N. H. 314; 1 Dana, 595; 2 Ld. Raym. 1472; id. 1307. There must be first a complaint supported by oath, showing probable cause, followed by arrest and examination, and a filing of the information—1 Abb. U. S. 431; 1 Sawy. 701. It cannot be amended by adding charges—1 Dana, 595; and objection to the filing, or a motion to quash, may be made in case of variance with the presentment—2 Gratt. 555. They may be amended by the court, or by a judge at chambers—38 N. H. 314.

CHAPTER IV.

THE WARRANT OF ARREST.

- § 811. Examination of the prosecutor and his witnesses upon the information.
- § 812. Depositions, what to contain.
- § 813. When warrant may issue.
- § 814. Form of warrant.
- § 815. Name or description of the defendant in the warrant, and statement of the offense.
- § 816. Warrant to be directed to and executed by peace officer.
- § 817. Who are peace officers.
- § 818. To what peace officers warrants are to be directed.
- § 819. Same; and when and how executed in another county.
- § 820. Indorsement on warrant, for service in another county.
- § 821. Defendant to be taken before the magistrate issuing the warrant, etc.
- § 822. Defendant arrested for misdemeanor in another county, to be admitted to bail.
- § 823. Proceedings on taking bail from the defendant in such cases.
- § 824. When bail is not given. When magistrate who issued warrant cannot act.
- § 825. No delay in taking defendant before magistrate.
- § 826. Proceedings where defendant is taken before another magistrate.
- § 827. Proceedings for offenses triable in another county.
- § 828. Duty of officer.
- § 829. Admission to bail.

811. When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

Proceedings.—The proceedings are regarded as continuous, unless formally adjourned—29 Mich. 173. An information not supported by oath or affirmation will not authorize a warrant of arrest—1 Abb. U. S. 431; 1 Gale & D. 454; 1 Q. B. 889. See 54 Cal. 103.

812. The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant.

813. If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest.

814. A warrant of arrest is an order in writing, in the name of the people, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

COUNTY OF —.

The People of the State of California to any sheriff, constable, marshal, or policeman of said State, or of the County of —:

Information on oath having been this day laid before me, by A. B., that the crime of — (designating it) has been committed, and accusing C. D. thereof, you are therefore commanded forthwith to arrest the above named C. D. and bring him before me at (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at —, this — day of —, eighteen—.

Before whom to be taken.—In case of the absence or disability to act of the justice issuing the warrant, the prisoner shall be taken before another magistrate, and a direction to that effect must be inserted in the warrant—19 Cal. 134; 54 Id. 103. The law of the State governs as to its legality—2 Watts, 165.

815. The warrant must specify the name of the defendant, or, if it is unknown to the magistrate, the defendant may be designated therein by any name. It must also state the time of issuing it, and the county, city, or town where it is issued, and be signed by the magistrate, with his name of office.

Validity of.—It is invalid if it does not state the specific offense—1 Parker Cr. R. 104; 8 Jur. 1071; 1 W. Bl. 555; 2 Term Rep. 18; 6 Id. 178; 9 East, 358; or if it fail to specify the defendant's name—10 Allen, 403; 1 W. Bl. 555; or if it omits the christian name—1 Moody C. C. 281.

816. The warrant must be directed to and executed by a peace officer.

To whom directed—19 Wis. 300; 7 Car. & P. 245. The officer may be described by name of his office—1 Barn. & C. 288; 2 Dowl. & R. 44.

817. A peace officer is a sheriff of a county, or a constable, marshal, or policeman of a township, city or town.

818. If a warrant is issued by a justice of the Supreme Court, or judge of a Superior Court, it may be directed generally to any sheriff, constable, marshal, or policeman in the State, and may be executed by any of those officers to whom it may be delivered. [In effect April 12th, 1880.]
See 54 Cal. 103.

819. If it is issued by any other magistrate, it may be directed generally to any sheriff, constable, marshal, or policeman in the county in which it is issued, and may be executed in that county; or, if the defendant is in another county, it may be executed therein upon the written direction of a magistrate of that county, indorsed upon the warrant, signed by him, with his name of office, and dated at the county, city, or town where it is made, to the following effect: "This warrant may be executed in the county of ——" (naming the county).
See 54 Cal. 103.

820. The indorsement mentioned in the last section cannot, however, be made unless the warrant of arrest be accompanied with a certificate of the clerk of the county where such warrant was issued, under the seal of the Superior Court thereof, as to the official character of the magistrate, or, unless upon the oath of a credible witness, in writing, indorsed on or annexed to the warrant, proving the handwriting of the magistrate by whom it was issued. Upon such proof, the magistrate indorsing the warrant is exempted from liability to a civil or criminal action, though it afterwards appear that the warrant was illegally or improperly issued. [In effect April 12th, 1880.]

821. If the offense charged is a felony, the officer making the arrest must take the defendant before the

magistrate who issued the warrant, or some other magistrate of the same county, as provided in section eight hundred and twenty-four.

One arrested for a felony, to procure bail, must be taken before the magistrate who issued the warrant, or some other magistrate, in the same county—54 Cal. 103.

822. If the offense charged is a misdemeanor, and the defendant is arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, and take bail from him accordingly.

See 54 Cal. 103. In fixing the amount of bail, the sole purpose should be to cause the appearance of accused to answer the charge—54 Cal. 75. Admission to bail, in all but capital cases, is a right of accused—19 Cal. 541. See Const. Prov. ante, page 15.

823. On taking the bail, the magistrate must certify that fact on the warrant, and deliver the warrant and undertaking of bail to the officer having charge of the defendant. The officer must then discharge the defendant from arrest, and must, without delay, deliver the warrant and undertaking to the clerk of the court at which the defendant is required to appear.

824. If, on the admission of the defendant to bail, the bail is not forthwith given, the officer must take the defendant before the magistrate who issued the warrant, or, in case of his absence or inability to act, before the nearest or most accessible magistrate in the same county, and must at the same time deliver to the magistrate the warrant with his return thereon indorsed and subscribed by him.

See 54 Cal. 103.

825. The defendant must in all cases be taken before the magistrate without unnecessary delay, and any attorney-at-law entitled to practice in courts of record of California, may, at the request of the prisoner after such arrest, visit the person so arrested. [In effect April 9th, 1880.]

826. If the defendant is brought before a magistrate other than the one who issued the warrant, the depositions

on which the warrant was granted must be sent to that magistrate, or, if they cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew.

Rights of prisoner.—The only rights that he can exact are, that the affidavits shall be transmitted, or that the prosecutor and his witnesses be summoned to testify anew—19 Cal. 135.

827. When an information is laid before a magistrate of the commission of a public offense triable in another county of the State, but showing that the defendant is in the county where the information is laid, the same proceedings must be had as prescribed in this chapter, except that the warrant must require the defendant to be taken before the nearest or most accessible magistrate of the county in which the offense is triable, and the depositions of the informant or prosecutor, and of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered.

828. The officer who executes the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable, and must deliver to him the depositions and the warrant, with his return indorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself.

829. If the offense charged in the warrant issued pursuant to section eight hundred and twenty-seven is a misdemeanor, the officer must, upon being required by the defendant, take him before a magistrate of the county in which the warrant was issued, who must admit the defendant to bail, and immediately transmit the warrant, depositions, and undertaking, to the clerk of the court in which the defendant is required to appear.

To procure bail, the prisoner must be taken before the magistrate who issued the warrant, or some other magistrate of the same county—54 Cal. 103. See *ante*, § 822, note.

CHAPTER V.

ARREST, BY WHOM AND HOW MADE.

- § 834. Arrest defined. By whom made.
- § 835. How an arrest is made and what restraint allowed.
- § 836. Arrests by peace officers.
- § 837. Arrests by private persons.
- § 838. Magistrates may order arrest.
- § 839. Persons making arrest may summon assistance.
- § 840. When the arrest may be made.
- § 841. Arrest, how made.
- § 842. Warrant must be shown, when.
- § 843. What force may be used.
- § 844. Doors and windows may be broken, when.
- § 845. Same.
- § 846. Weapons may be taken from persons arrested.
- § 847. Duty of a private person who has made an arrest.
- § 848. Duty of officer arresting with warrant.
- § 849. Person arrested without a warrant to be taken before a magistrate. Information to be filed.
- § 850. Arrest by telegraph.
- § 851. Same.

834. An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.

Arrest, when illegal.—An arrest will not be avoided by mere clerical or formal errors in the warrant—83 Mass. 4; see 49 Barb. 89; 8 Rich. 17. A warrant may be void as to the parties, but voidable only as to the officer—21 N. H. 282; 1 Lead. O. C. 200. When absolutely void, the officer cannot excuse himself—20 Vt. 321; as where it is dated on Sunday—13 Mass. 324; or where it has no seal—1 Hayw. 471; 36 Me. 366; 5 Ired. 72; 1 East P. O. ch. 5, § 58; but a waiver or scroll is sufficient—34 Me. 210; 9 Watts. 311; 49 Mo. 188; 9 Jur. 442; 7 Q. B. 232.

Validity of arrest.—To make an arrest valid, the officer must be engaged in the execution of a duty—13 Cox C. C. 202. Where an arrest is made beyond the jurisdiction of the magistrate who issued the warrant, it is illegal—65 N. C. 327; 79 Id. 605; or outside of the district of the officer—1 Conn. 40; 4 Id. 107; 7 Id. 456; 4 Mass. 232. Where a fugitive was arrested in another State, though the arrest is illegal, it is not ground for his discharge on *habeas corpus*—18 Pa. St. 37. See 4 Parker Cr. R. 253. Where the offense charged in the warrant is not a subject of arrest, it is illegal—20 Alb. L. J. 215. Where a person has been discharged by a magistrate, an officer cannot re-arrest him without

a new warrant—30 Barb. 300, disapproving 6 Hill. 349; but an officer may re-arrest a person after voluntarily releasing him—9 Met. 259.

835. An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention.

Arrest, how made.—No manual touching is necessary—18 Ga. 392; it is sufficient if the party be within the power of the officer and submits to the arrest—1 Wend. 215; 20 Ga. 371; 18 N. H. 198; 1 Car. & P. 153; Moody & M. 244; *contra*, 2 N. H. 318; Harp. (S. C.) 453; Bald. 239; 3 Har. (Del.) 416; *id.* 568. It is the duty of the party to submit—4 Allen, N. B. 440. To inform defendant that he is arrested, and to lock the door, is sufficient—Cas. t. Hardw. 284; or to inform him, and touch him only with the finger—1 Salk. 79.

836. A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person—

1. For a public offense committed or attempted in his presence.

2. When a person arrested has committed a felony, although not in his presence.

3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

5. At night, when there is reasonable cause to believe that he has committed a felony.

Subd. 1. Offenses committed in presence of officer—5 Har. (Del.) 506; 19 Ohio St. 248; 2 Hill, (S. C.) 619; 8 Serg. & R. 47; 71 Ill. 73; 17 How. Pr. 100; 3 Wend. 384; 9 Car. & P. 474; 5 El. & B. 188; or even after, if danger has not ceased—7 Cox C. C. 389; and see 71 Ill. 73; *limited*, 36 N. H. 246.

Subd. 2. For felony—12 Cush. 246; *id.* 615; 71 Ill. 78; Cald. 291; 1 Lead. C. C. 195; and such misdemeanors as cannot be stopped or redressed without immediate arrest—3 Fost. & F. 859; 4 *id.* 155; but for cruelty to animals, he cannot arrest without a warrant—5 Lans. 84; 2 Daly, 220.

Subd. 3. Probable cause.—An officer may arrest on probable ground of suspicion, and without a warrant—30 Ga. 430; 14 Gray, 65; 6 Humph. 53; 1 Moody C. C. 634; see 46 Ga. 86; and to justify him, it will not be necessary to establish the guilt of the party—49 Ind. 56; 1 Am. Cr. R. 60; so, of a constable—1 Wheel. C. C. 137. A constable may arrest on reasonable cause of suspicion, or for breach of peace in his presence—67 Pa. St. 30; 8 Serg. & R. 47. So, a peace officer, for reasonable cause, may arrest for felony—49 Ind. 56; 6 Humph. 53; 5 Cush. 281.

He cannot arrest for a crime proved or suspected, unless it be a felony—13 Cush. 246; 1d. 615. *Contra*, 5 Har. (Del.) 506.

Subd. 4. On charge of felony.—A peace officer, on reasonable cause, on a charge of felony, can arrest without a warrant, but a private person cannot—1 Doug. 359; 1 Lead. C. C. 194; but he is not bound to arrest merely on representations that he is a thief—5 City H. Rec. 4. Mere manner, in a man accused of crime, is not probable cause—37 Mich. 299. Refusal to arrest—see *ante*, § 142. Warrant to be directed to, and executed by, officer—see *ante*, § 816. Who are peace officers—*ante*, § 817. To what to be directed—*ante*, §§ 818, 819. Duty on arrest—§ 849.

837. A private person may arrest another—

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

Subd. 1. Private persons.—It is the duty of all persons to use all lawful means to arrest one committing a breach of the peace—4 City H. Rec. 111; or an affray—1 Root, 66; but he is not justified without a warrant, unless the affray is still continuing, or there is reasonable ground to apprehend its renewal—10 Clark & F. 28; S. C. 1 Lead. C. C. 177. But a private person cannot, of his own authority, after an affray or breach of the peace—11 Johns. 486. For misdemeanors, after their commission, an arrest can only be made on a warrant—3 Parker Cr. R. 249.

Subd. 2. For felony.—A private person may arrest, without warrant, one who has committed a felony—1 Wheel. C. C. 101; 3 Wend. 350; 11 Johns. 486; 3 Parker Cr. R. 249; 17 How. Pr. 100; 12 Ga. 318; or, on suspicion, with good reason, where a crime has been actually committed—40 N. Y. 463; 3 Wend. 350; but it must be a felony which may be tried in the State—51 Barb. 91; as for an escape—48 N. H. 377.

Subd. 3. Reasonable cause.—see 40 N. Y. 463; 3 Wend. 350. May arrest on probable cause—32 N. J. L. 70; 3 Wend. 350; 8 Serg. & R. 47; 6 Binn. 316; 66 Ind. 464; 2 Dev. 68; 3 Jones, (N. C.) 434; but to justify, an offense must be in fact committed—40 N. Y. 453; 61 Pa. St. 352; 54 Barb. 490; 2 Selw. N. P. 943.

838. A magistrate may orally order a peace officer or private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate.

Magistrate may, on his own view, and without a warrant, arrest a party for a breach of the peace—5 City H. Rec. 25.

839. Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein.

Duty to aid officers. It is the duty of all persons to use their exertions to detect and punish crime; but the law imposes no obligation on a private citizen, unless called on by a ministerial officer—12 Ohio, 281.

840. If the offense charged is a felony, the arrest may be made on any day, and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate, indorsed upon the warrant.

841. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape.

Notice of arrest must be given expressly or by implication—27 Cal. 572; 32 N. Y. 509; 76 N. C. 10; 9 Coke, 65; 1 Moody C. C. 207; id. 390; id. 378. So a private person arresting another must notify the party of his purpose—65 N. C. 327. A constable showing his badge or staff of office is sufficient intimation of his authority—32 N. Y. 509; 1 Moody C. C. 334; but where the defendant knows the officer, it is sufficient notice—27 Cal. 575; 6 Gray, 350; 10 Mich. 169; 10 Wend. 514; 5 Har. (Del.) 487; 17 Ga. 194; Cro. Car. 183. Municipal officers are under the protection of the law—30 Ga. 426; but if a policeman be not known, resistance is not a crime—76 N. C. 10; 7 Tex. Ct. App. 183. He should make known his official character—2 Hill, 86. When a party is apprehended in the commission of an offense, notice of official character or cause of arrest is not necessary—27 Cal. 572.

842. If the person making the arrest is acting under the authority of a warrant, he must show the warrant, if required.

Must show warrant.—A person arrested has a right to see the warrant unless he first resist—10 Mich. 169; 6 Gray, 350; 42 Me. 394; 13 Mass. 321; 1 Hayw. 471; 10 Wend. 514; and see 5 Har. (Del.) 487; 19 Ohio St. 425; and if the officer is not known he is bound to show his authority—2 Ired. 201; 1 Winst. (N. C.) No. 1, 144. Where a violent assault is made upon the officer, notice is not required—27 Cal. 592; 3 Head. 127. The officer is not bound to exhibit his warrant before securing his prisoner—6 Gray, 350; 30 Ga. 428. A regular officer within his district is not bound to show his process—2 Hill, 86.

843. When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest.

Force may be used.—The officer must make the arrest with as little force as possible—3 Har. (Del.) 568; but all necessary force may be used—8 Wis. 132; and he will be justified in killing to prevent an escape after the actual commission of a felony—5 Parker Cr. R. 234; but wanton exercise of lawful power may be resisted—2 Houst. 605. A peace officer may arrest one fleeing, after commission of a felony, without a warrant—27 Cal. 572; or after an escape—48 N. H. 377. So a private person may arrest another on the authorization of an officer, if both be in pursuit—13 Mass. 331. An officer has a right to call in his aid any and all persons—10 Johns. 85; and for them to refuse assistance is an indictable offense—Law Rep. 1 C. C. 20. They must be actually or constructively under the officer's command—2 Doug. (Mich.) 1; 3 Ired. 20; 7 Eng. 50; 7 Car. & P. 775. All pursuers of a felon are protected by law—61 Pa. St. 352; 6 Cold. 283; 1 East P. C. 298. Fresh pursuit and immediate pursuit are synonymous—27 Cal. 572.

844. To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired. [Approved March 30th, in effect July 1st, 1874.]

Breaking into house.—Before an officer with a warrant may break open doors to execute process, he must first demand admittance and be refused—10 Johns. 263; 1 N. H. 346; 1 Root, 134; id. 83; 2 Houst. (Del.) 585; 11 Gray, 194. A police officer may enter a house to suppress disorder—5 Har. (Del.) 491.

845. Any person who has lawfully entered a house for the purpose of making an arrest may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein.

846. Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken.

847. A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer.

Duty on making arrest.—On arresting, he may take the prisoner to the county jail, or before a justice of the peace—8 Serg. & R. 47; or other magistrate—12 Ga. 293, 318; 46 Id. 86.

848. An officer making an arrest, in obedience to a warrant, must proceed with the person arrested as commanded by the warrant, or as provided by law.

Duty of officer.—The officer must follow the statute as to the magistrate to whom the party is to be delivered—110 Mass. 319.

849. When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before such magistrate.

See 1 Wheel. C. C. 101; 3 Wend. 350. The pendency of one information is no bar to the presentation of another—4 Pac. C. L. J. 526.

850. A justice of the Supreme Court, or a judge of a Superior Court, may, by an indorsement under his hand upon a warrant of arrest, authorize the service thereof by telegraph, and thereafter a telegraphic copy of such warrant may be sent by telegraph to one or more peace officers; and such copy is as effectual in the hands of any officer, and he must proceed in the same manner under it, as though he held an original warrant issued by the magistrate making the indorsement. [In effect April 12th, 1880.]

Arrest by telegraph.—An officer arresting for felony on telegraphic or other dispatch, without a warrant, must take the party at once before some examining officer—29 How. Pr. 186; and there must be reasonable diligence—Id.

851. Every officer causing telegraphic copies of warrants to be sent must certify as correct, and file in the telegraph office from which such copies are sent, a copy of the warrant and indorsement thereon, and must return the original with a statement of his action thereunder.

CHAPTER VI.

RETAKING AFTER AN ESCAPE OR RESCUE.

§ 854. May be at any time or in any place in the State.

§ 855. May break open door or window if admittance refused.

854. If a person arrested escape or is rescued, the person from whose custody he escaped or was rescued, may immediately pursue and retake him at any time and in any place within the State.

See *ante*, § 834, note.

855. To retake the person escaping or rescued, the person pursuing may break open an outer or inner door or window of a dwelling-house, if, after notice of his intention, he is refused admittance.

See *ante*, § 844.

CHAPTER VII.

EXAMINATION OF THE CASE, AND DISCHARGE OF THE DEFENDANT, OR HOLDING HIM TO ANSWER.

- § 858. Magistrate to inform the defendant of the charge, and his right to counsel.
- § 859. Time to send and sending for counsel.
- § 860. Examination, when to proceed.
- § 861. When to be completed. Postponement.
- § 862. On postponement, defendant to be committed or discharged on bail.
- § 863. Form of commitment.
- § 864. Depositions to be read on examination and subpoenas issued.
- § 865. Examination of witnesses to be in presence of defendant.
- § 866. Examination of defendant's witnesses.
- § 867. Exclusion and separation of witnesses.
- § 868. Who may be present at the examination.
- § 869. Testimony, how taken and authenticated.
- § 870. Deposition, by whom and how kept.
- § 871. Defendant, when and how discharged.
- § 872. When and how to be committed.
- § 873. Order for commitment.
- § 874. Certificate of bail being taken. [Repealed.]
- § 875. Order for bail on commitment.
- § 876. Commitment, how made and to whom delivered.
- § 877. Form of commitment.
- § 878. Undertaking of witnesses to appear.
- § 879. Security for the appearance of witnesses.
- § 880. Infants and married women may be required to give security.
- § 881. Witnesses to be committed on refusal to give security for their appearance.
- § 882. Witness unable to give security may be conditionally examined. Not applicable to prosecutor or accomplice.
- § 883. Magistrate to return depositions, etc., to the court.

858. When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against

him, and of his right to the aid of counsel in every stage of the proceedings.

The charge mentioned in this section is not the same as the charge mentioned in § 917 of this Code—44 Cal. 557. A justice of the peace and a district judge are alike constituted magistrates—39 Cal. 706. A preliminary examination cannot be waived—39 Cal. 708. The right to counsel extends only to those in custody—55 Cal. 298. On a writ of habeas corpus, the court may exact an immediate examination—32 N. J. L. 313.

859. He must also allow the defendant a reasonable time to send for counsel, and postpone the examination for that purpose; and must, upon the request of the defendant, require a peace officer to take a message to any counsel in the township or city the defendant may name. The officer must, without delay and without fee, perform that duty.

See 55 Cal. 298.

860. If the defendant requires the aid of counsel, the magistrate must, immediately after the appearance of counsel, or if, after waiting a reasonable time therefor, none appears, proceed to examine the case.

861. The examination must be completed at one session, unless the magistrate, for good cause shown by affidavit, postpone it. The postponement cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant.

Continuance.—A person arrested, charged with a crime in another State, before a demand for his surrender has been made, is entitled to his discharge if a postponement is granted longer than the statutory time—51 Cal. 288. If requisite, the hearing may be adjourned from day to day—29 Mich. 173.

862. If a postponement is had, the magistrate must commit the defendant for examination, admit him to bail or discharge him from custody upon the deposit of money as provided in this Code, as security for his appearance at the time to which the examination is postponed.

See 19 Cal. 539; *ante*, § 822, note.

863. The commitment for examination is made by an indorsement, signed by the magistrate on the warrant of arrest, to the following effect: "The within named A. B.

having been brought before me under this warrant, is committed for examination to the sheriff of ——." If the sheriff is not present, the defendant may be committed to the custody of a peace officer.

864. At the examination, the magistrate must first read to the defendant the depositions of the witnesses examined on taking the information. He must also issue subpoenas, subscribed by him, for witnesses within the State, required either by the prosecution or the defense.

865. The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf.

866. When the examination of witnesses on the part of the people is closed, any witnesses the defendant may produce must be sworn and examined.

867. While a witness is under examination, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined.

Exclusion of witnesses—53 Cal. 491.

868. The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney-general, the district attorney of the county, the defendant and his counsel, and the officer having the defendant in custody.

See *ante*, § 867.

869. The testimony of each witness, in cases of homicide, must be reduced to writing, as a deposition, by the magistrate, or under his direction; and in other cases upon the demand of the prosecuting attorney, or the defendant, or his counsel. The magistrate before whom the examination is had may, in his discretion, order the testimony and proceedings to be taken down in short-hand in all examinations herein mentioned, and for that pur-

pose he may appoint a short-hand reporter. The deposition or testimony of the witness must be authenticated in the following form:

1. It must state the name of the witness, his place of residence, and his business or profession.

2. It must contain the questions put to the witness, and his answers thereto, each answer being distinctly read to him as it is taken down, and being corrected or added to until it conforms to what he declares is the truth: except in cases where the testimony is taken down in short-hand, the answer or answers of the witness need not be read to him.

3. If a question put be objected to on either side and overruled, or the witness declines answering it, that fact, with the ground on which the question was overruled or the answer declined, must be stated.

4. The deposition must be signed by the witness, or if he refuses to sign it, his reason for refusing must be stated in writing as he gives it: except in cases where the deposition is taken down in short-hand, it need not be signed by the witness.

5. It must be signed and certified by the magistrate when reduced to writing by him, or under his direction, and when taken down in short-hand, the transcript of the reporter appointed as aforesaid, when written out in long-hand writing and certified as being a correct statement of such testimony and proceedings in the case, shall be *prima facie* a correct statement of such testimony and proceedings. The reporter shall, within ten days after the close of such examination, (if the defendant be held to answer to the charge), transcribe into long-hand writing his said short-hand notes, and certify and file the same with the county clerk of the county, or city and county, in which the defendant was examined, and shall in all cases file his original notes with said clerk. [In effect March 3rd, 1881.]

SEC. 2. The reporter's fees shall be paid out of the treasury of the

county, or the city and county, on the certificate of the committing magistrate.

A deposition not certified by the magistrate, otherwise than by a jurat in the ordinary form, is inadmissible—54 Cal. 677. The certificate must set forth actual compliance with all the requirements of the statute—6 Cal. 559. The deposition is not the only evidence on a charge of perjury, but parole evidence may be introduced to prove what was sworn to on the examination—50 Cal. 98. If the magistrate erroneously excludes a question, it is no injury if the testimony was immaterial—50 Cal. 139. There are cases in which a magistrate should call witnesses for the defense, as where the prosecution calls only a part of the witnesses—2 Wash. C. C. 29; or where a party tenders a license in evidence—5 Best & S. 645; or where defendant offers testimony to explain, or divert from himself the responsibility—2 Car. & K. 845. See *post*, § 882.

870. The magistrate or his clerk must keep the depositions taken on the information or on the examination, until they are returned to the proper court; and must not permit them to be examined or copied by any person except a judge of a court having jurisdiction of the offense, or authorized to issue writs of habeas corpus, the attorney-general, district attorney, or other prosecuting attorney, and the defendant and his counsel.

871. If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged, by an indorsement on the depositions and statement, signed by him, to the following effect: "There being no sufficient cause to believe the within named A. B. guilty of the offense within mentioned, I order him to be discharged."

Order of discharge.—The order of discharge shall be reduced to writing—19 Cal. 137. The omission of the name of the accused is not such a defect as will entitle him to a discharge on habeas corpus—42 Cal. 200; 51 *id.* 376; 35 *id.* 100. The mere recommendation of a grand jury, that the party be detained to answer before another grand jury, is not of itself good cause for detention—42 Cal. 200.

872. If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the deposition an order, signed by him, to the following effect: "It appearing to me that the offense in the within depositions

mentioned, (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer to the same, and committed to the sheriff of the county of —." [In effect April 15th, 1880.]

Commitment.—There is no authority in the Penal Code for the waiver of examination—6 Pac. C. L. J. 526. The Penal Code authorizes proceedings by information only when defendant has been examined and committed—*id.* In Virginia, in cases of felony a preliminary examination is not necessary—23 Gratt. 919. That there is good cause for detention of accused must be left to the discretion of the court, which cannot be reviewed on habeas corpus—42 Cal. 199; 19 *id.* 137. If the magistrate has indorsed his order of discharge on the depositions and statement, or entered it in his docket, commitments may be issued until the object of the order has been accomplished—19 Cal. 137. Probable cause is sufficient—Burr's Trial, 11, 15; 1 Crumr. (Pitts.) 437. What is a good cause must be determined by the particular circumstances—42 Cal. 200. If it appears that a public offense has been committed, and there is sufficient cause to believe defendant is guilty, an order must be indorsed on the deposition that he be held to answer—49 Cal. 651. It is not necessary that the binding over shall be for the specific charge, if, on hearing, the offense takes another shape—12 Kan. 172; *contra*, 34 Mich. 286. Holding defendant to trial is only a decision that there is a probable cause that he should be tried—35 Me. 129; 2 Ben. 356; *id.* 419; 17 Iowa, 336; 34 Mich. 286; 1 Barn. & C. 37. The District Court has jurisdiction to make an order holding accused to answer a criminal charge—51 Cal. 376. The Code authorizes a proceeding by information only when a defendant has been examined and committed—6 Pac. C. L. J. 526. See *ante*, § 509.

873. If the offense is not bailable, the following words must be added to the indorsement: "And he is hereby committed to the sheriff of the county of —."

See 49 Cal. 651.

874. Section eight hundred and seventy-four of said Code is hereby repealed. [In effect April 15th, 1880.]

875. If the offense is bailable, and the defendant is admitted to bail, the following words must be added to the order: "And that he be admitted to bail in the sum of — dollars, and is committed to the sheriff of the county of — until he gives such bail." [In effect April 15th, 1880.]

If the commitment be for an indefinite or unreasonable time, the warrant is void—see 9 Wall. 13; 10 Barn. & C. 28; 1 Man. & G. 257. See 49 Cal. 651.

Excessive bail is not to be required—37 Conn. 355. See Const. Prov. *ante*, page 15. Bail is to be taken in all but capital cases when, if the proof is strong, bail will be refused—2 Dall. 343; 8 Abb.

Pr. N. S. 27; 24 Ark. 275; 36 Ala. 300; 34 id. 270; 5 Cowen, 39; 10 Gray, 282; 5 City H. Rec. 11; 1 Haist. 332; 23 Ill. 494; 27 Ind. 87; 39 Miss. 715; 20 N. H. 160; 4 Parker Cr. R. 651; 25 Tex. 395; id. 519; 31 id. 566. See Const. Provisions, *ante*, page 15. The test to be adopted is the probability of the accused appearing to take his trial—2 Ashm. 227; 34 Ala. 270; 5 Cowen, 39; 4 Parker Cr. R. 651; 2 Pitts. 362; 19 Wis. 676. What to one is oppressive to another is light, and of this the court is to judge—1 Cal. 9; 8 Barb. 158; 4 Parker Cr. R. 651; 4 Q. B. 468. The action of the court, unless oppressive, is not revisable in error—3 Abb. Pr. N. S. 27; 33 Ga. 192; otherwise, where there is a constitutional right—30 Miss. 673. See 49 Cal. 651; 51 id. 376. Under proper and peculiar circumstances danger to life may justify release on bail—3 Wash. C. C. 224; 10 Mod. 334; 1 Salk. 103; 1 Strange, 2. See Bail, *post*, § 1268.

876. If the magistrate order the defendant to be committed, he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or, if that officer is not present, to a peace officer, who must deliver the defendant into the proper custody, together with the commitment.

See 49 Cal. 651; 51 Cal. 376.

877. The commitment must be to the following effect:

COUNTY OF — (as the case may be).

The People of the State of California to the Sheriff of the County of —:

An order having been this day made by me, that A. B. be held to answer upon a charge of (stating briefly the nature of the offense, and giving as near as may be the time when and the place where the same was committed), you are commanded to receive him into your custody and detain him until he is legally discharged.

Dated this — day of —, eighteen —.

A commitment for murder must state the name of the person murdered, but the omission will not entitle accused to a discharge on habeas corpus—42 Cal. 199; and for rape, on whom it was committed, and the use of violence—19 Cal. 133. If it appear that the party is guilty, the court will not discharge him without allowing time for his arrest—2 Cal. 144. A commitment is insufficient if it fail to state the name of the party murdered, or to state that his name was unknown—42 Cal. 199; and to detain him till legally discharged—49 Cal. 651. See *ante*, § 876, note.

878. On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him on the part of the people a written

undertaking, to the effect that he will appear and testify at the court to which the depositions and statements are to be sent, or that he will forfeit the sum of five hundred dollars.

879. When the magistrate or a judge of the court in which the action is pending is satisfied, by proof on oath, that there is reason to believe that any such witness will not appear and testify unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance as specified in the preceding section.

See ante, §§ 865, 869; post, § 882.

880. Infants and married women, who are material witness against the defendant, may be required to procure sureties for their appearance, as provided in the last section.

881. If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the magistrate must commit him to prison until he complies or is legally discharged.

882. When, however, it satisfactorily appears by examination, on oath, of the witness, or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the people. Such examination must be by question and answer, in the presence of the defendant, or after notice to him, if on bail, and conducted in the same manner as the examination before a committing magistrate is required by this Code to be conducted, and the witness thereupon be discharged; but this section does not apply to an accomplice in the commission of the offense charged. [In effect March 14th, 1878.]

Deposition of witness for the people may be taken where he is unable to procure sureties—49 Cal. 38.

883. When a magistrate has discharged a defendant, or has held him to answer, he must return, without delay, to the clerk of the court at which the defendant is required to appear, the warrant, if any, the depositions, and all undertakings of bail, or for the appearance of witnesses, taken by him.

TITLE IV.

Of Proceedings after Commitment and before Indictment.

CHAP. I. PRELIMINARY PROVISIONS, §§ 888-90.

II. FORMATION OF THE GRAND JURY, §§ 894-910.

III. POWERS AND DUTIES OF A GRAND JURY,
§§ 915-28.

IV. PRESENTMENT AND PROCEEDINGS THEREON,
§§ 931-7.

PEN. CODE.—29.

CHAPTER I.

PRELIMINARY PROVISIONS.

- § 888. Offenses, how prosecuted.
- § 889. What by accusation or information.
- § 890. Indictments and accusations, in what court found.

888. All public offenses triable in the Superior Courts must be prosecuted by indictment or information, except as provided in the next section. [In effect April 9th, 1880.]

Indictment.—Neither the Constitution nor the Penal Code prohibits prosecution, by indictment, of any criminal offense, including a misdemeanor—53 Cal. 412. Where a statute creating a felony was repealed, a felony, committed before the repeal, could, nevertheless, be prosecuted by indictment—6 Pac. C. L. J. 727.

889. When the proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by an accusation or information, in writing, as provided in sections seven hundred and fifty-eight and seven hundred and seventy-two.

Information.—The Code authorizes a proceeding by information, only when a defendant has been examined and committed—6 Pac. C. L. J. 526.

890. All accusations, informations, or indictments against district, county, municipal, and township officers, must be found or filed in the Superior Court. [In effect April 12th, 1880.]

CHAPTER II.

FORMATION OF THE GRAND JURY.

- § 894. Who may challenge the panel or an individual juror.
- § 895. Cause of challenge to a panel.
- § 896. Cause of challenge to an individual grand juror.
- § 897. Manner of taking and trying challenges.
- § 898. Decision upon challenges.
- § 899. Effect of allowing a challenge to a panel.
- § 900. Effect of allowing challenge to an individual juror.
- § 901. Objections can only be taken by challenge.
- § 902. Appointment of a foreman.
- § 903. Oath of foreman.
- § 904. Oath of other grand jurors.
- § 905. Charge of the court.
- § 906. Retirement of the grand jury. Discharge of.
- § 907. Special grand jury.
- § 908. Order for special grand jury.
- § 909. Order, how executed.
- § 910. Special grand jury, how formed.

894. The people, or a person held to answer a charge for a public offense, may challenge the panel of a grand jury, or an individual juror.

Right of challenge.—If the right to challenge the panel of the grand jury be denied, the indictment is void; but it must be claimed at the time—18 Cal. 93; 15 Id. 331; 14 Id. 566. See as to formation of grand jury—Code of Civ. Proc.

895. A challenge to the panel may be interposed for one or more of the following causes only:

1. That the requisite number of ballots was not drawn from the jury-box of the county.
2. That notice of the drawing of the grand jury was not given.
3. That the drawing was not had in the presence of the officers designated by law.

Challenge to panel.—Irregularity in selecting and impanelling must be objected to by a challenge to the array—45 Cal. 29; 10 Blatchf. 21; 2 Wend. 314; 35 Ga. 336; 45 Miss. 683; 24 Id. 445; 50 Id. 269; 12 Smedes

& M. 68; 7 Yerg. 271; 12 Tex. 252; 1 Tex. Ct. App. 1; 6 Tex. 99. A challenge to the array must be taken before the general issue—46 Cal. 141; 73 Pa. St. 34; 30 Ohio St. 542; 73 Ill. 256; 25 Miss. 203; 45 id. 572; 60 Mo. 91; 23 Minn. 104; 29 Ark. 165. As to practice in North Carolina—73 N. C. 437; in New York—64 N. Y. 485; 50 How. Pr. 280; in the latter State, challenge to the array is not permitted—64 N. Y. 483. This section was intended to restrict the right of challenge to the three grounds enumerated—46 Cal. 148; 32 id. 68; and to so restrict the right is within the power of the Legislature—46 id. 146. An objection to the formation of the grand jury cannot be presented in the court below on motion to set aside the indictment—54 Cal. 65; id. 37; 46 id. 141. So, if the court improperly directs the coroner to serve a special venire, the defendant cannot challenge the panel on the ground that he is not qualified to serve it—49 Cal. 178; 46 id. 154. That the officers, whose duty it was to select the jurors, were two or three weeks at it, or that one was temporarily absent, is no ground of challenge—6 Serg. & R. 395; but strong bias on the part of persons employed to draw may be a cause—5 S. C. 429.

Challenge, when taken.—Challenges to the panel, if defendant has been held to answer before that time, must be taken before the grand jury is made up and sworn—14 Cal. 569; 15 id. 331; id. 479; 28 id. 469; 18 id. 93. See 23 Cal. 632. But if he has already been held to answer by the grand jury, he may challenge the panel on his arraignment—14 Cal. 569. It must be taken before the general issue—46 Cal. 141; 29 Ark. 165; 23 Minn. 104; 45 Miss. 572; 68 Mo. 91; 73 Ill. 256; 30 Ohio St. 542; 73 Pa. St. 34.

896. A challenge to an individual grand juror may be interposed for one or more of the following causes only:

1. That he is a minor.
2. That he is an alien.
3. That he is insane.
4. That he is a prosecutor upon a charge against the defendant.
5. That he is a witness on the part of the prosecution, and has been served with process or bound by an undertaking as such.
6. That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety, provided it satisfactorily appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and

fairly upon the matters to be submitted to him. [Approved March 30th, in effect July 1st, 1874.]

Challenge to juror.—A juror may be challenged for disqualification—51 Ind. 14. The objection must be made before indictment—see 2 Browne, (Pa.) 325; before the jury is sworn—15 Cal. 329; 32 id. 445; see § 895, note; before it is received by the court and filed—9 Mass. 107; 2 Pick. 563; 3 Wend. 314. An *amicus curiæ* may intervene and object—9 Mass. 107; yet generally the right is limited to the party accused—1 Blackf. 318; id. 390; 5 id. 75; 2 Doug. (Mich.) 418; 35 Ga. 336; 12 Mo. 404; 4 Parker Cr. R. 222; *contra*, 8 Mass. 286; 11 Ala. 57; 1 id. 655. After indictment, an objection that a juror was an alien cannot be taken—2 Port. 100; but it may be taken by plea in abatement—5 id. 484; 7 id. 167; 11 Ala. 57; 40 Ill. 268; see 1 Dill. 485; 2 Va. Cas. 20; 53 Ga. 73; 1 Gratt. 556; 17 Ohio, 222; 30 Ohio St. 542; but this must be before general issue is pleaded—9 Ala. 10; 11 id. 57; 21 Ark. 198; 12 Fla. 562; 15 Me. 104; 36 id. 128; 49 id. 588; 53 id. 328; 2 Barb. 427; 2 Ashm. 90; 5 Gratt. 702; 2 Ired. 101; 6 id. 98; 9 Ga. 58; id. 210; 53 id. 73; 33 N. H. 216; 74 N. C. 316; 12 Vt. 422; 24 Miss. 445; 25 id. 728; 3 Parker Cr. R. 112; 7 Yerg. 271; 10 id. 527; 12 Smedes & M. 68; 8 id. 587; id. 599; 11 Tex. 261; 12 id. 252; see 54 Ala. 93; 12 Tex. 283; 64 N. Y. 485. That a juror has formed or expressed an opinion is a good ground for challenge—32 Cal. 68; 3 Wend. 314; 5 Cranch C. C. 457; 2 Browne, (Pa.) 325; 7 Iowa, 287; 51 Me. 395; but see 40 Ill. 268; 11 Ala. 57. A challenge lies for personal interest in conflict with the defendant—8 Mass. 286; see 1 Dill. 485; 82 Pa. St. 306; *contra*, 2 Tyler, 473; so, a conscientious scruple is a ground of challenge—1 Halst. 332; 5 id. 83; 2 Ind. 329; 2 Blackf. 477; 7 Yerg. 271. But that a juror belongs to an association whose object is to detect crime, is not a ground of challenge—40 Ill. 268. The presumption is, that the court did not excuse a person as a grand juror without legal cause—32 Cal. 45; 35 id. 48.

Subds. 5 and 6. See post, §§ 1072, 1073, 1074.

897. The challenges mentioned in the last three sections may be oral or in writing, and must be tried by the court. [Approved March 30th, in effect July 1st, 1874.]

See post, § 1078.

898. The court must allow or disallow the challenge, and the clerk must enter its decisions upon the minutes.

See post, § 1083.

899. If a challenge to the panel is allowed, the grand jury are prohibited from inquiring into the charge against the defendant, by whom the challenge was interposed. If, notwithstanding, they do so, and find an indictment against him, the court must direct it to be set aside.

900. If a challenge to an individual grand juror is allowed, he cannot be present or take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon. The grand jury must inform the court of a

violation of this section, and it is punishable by the court as a contempt.

Effect of challenge.—Where some of the jurors are rejected, the remaining grand jurors, if of the requisite number, constitute the grand jury—54 Cal. 39. If more than one person awaits the action of the grand jury, and the jury is disqualified from acting on the case of one, it may nevertheless act on the case of the others 32 Cal. 68; 54 id. 40. An indictment is not vitiated because one of the grand jurors challenged and excluded appears in court when the indictment is presented—20 Cal. 146. An indictment may be legally found by thirteen out of the sixteen grand jurors impaneled—20 Cal. 146; 8 id. 435; 54 id. 40. See *post*, §§ 995, 1085.

901. A person held to answer to a charge for a public offense can take advantage of any objection to the panel or to an individual grand juror in no other mode than by challenge.

This section applies only to cases where defendant is held to answer—14 Cal. 569.

902. From the persons summoned to serve as grand jurors and appearing, the court must appoint a foreman. The court must also appoint a foreman when the person already appointed is excused or discharged before the grand jury is dismissed.

Foreman.—The appointment of foreman need not be entered on the minutes of the court if the indictment is indorsed by him, and returned to the court—6 Cal. 214.

903. The following oath must be administered to the foreman of the grand jury: "You, as foreman of the grand jury, will diligently inquire into, and true presentment make, of all public offenses against the people of this State, committed or triable within this county, of which you shall have or can obtain legal evidence. You will keep your own counsel, and that of your fellows, and of the government, and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor anything which you or any other grand juror may have said, nor the manner in which you or any other grand juror may have voted on any matter before you. You will present no person through malice, hatred, or ill-will, nor leave any unrepresented through fear, favor, or affection, or for any reward, or the promise or hope thereof; but in

all your presentments you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, so help you God." [Approved March 30th, in effect July 1st, 1874.]

Oath of foreman.—The usual practice is to swear the foreman first, and then swear the others—5 Eng. 607.

904. The following oath must be immediately thereupon administered to the other grand jurors present: "The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part, so help you God."

Form of oath.—The form of oath to the grand jurors should be substantially followed—5 Eng. 607. Where one was not present when the rest were sworn, he may be sworn afterward—11 Mass. 142; and see 5 Ga. 607.

905. The grand jury being impaneled and sworn, must be charged by the court. In doing so, the court must give them such information as it may deem proper, or as is required by law, as to their duties, and as to any charges for public offenses returned to the court or likely to come before the grand jury.

906. The grand jury must then retire to a private room, and inquire into the offenses cognizable by them. On the completion of the business before them, they must be discharged by the court; but, whether the business is completed or not, they are discharged by the final adjournment of the court.

907. If an offense is committed during the sitting of the court, after the discharge of the grand jury, the court may, in its discretion, direct an order to be entered that the sheriff summon another grand jury.

Offense must be committed during the sitting of the court, to authorize a special grand jury—54 Cal. 40. It is competent for a judge after commencement of the session to order a special grand jury to be summoned—43 Cal. 445.

908. The order must require the sheriff to summon sixteen persons, qualified to serve as grand jurors, to appear at a time specified, and a copy thereof, under the seal of the court, must, by the clerk, be delivered to the sheriff.

909. The sheriff must execute the order and return it, with a list of names of the persons summoned.

910. At the time appointed the list must be called over, and the names of those in attendance be written by the clerk on separate ballots and put into a box, from which a grand jury must be drawn.

Impanneling a special grand jury in accordance with §§ 226 and 241 of the Code of Civil Procedure is valid for every purpose—47 Cal. 136.

CHAPTER III.

POWERS AND DUTIES OF A GRAND JURY.

- § 915. Powers of grand jury.
- § 916. Presentment defined.
- § 917. Indictment defined.
- § 918. Foreman may administer oaths.
- § 919. Evidence receivable before the grand jury.
- § 920. Grand jury not bound to hear evidence for the defendant
- § 921. Degree of evidence to warrant indictment.
- § 922. Grand jurors must declare their knowledge as to commission of public offense.
- § 923. Must inquire into cases of persons imprisoned, etc.
- § 924. Entitled to access to public prison, etc.
- § 925. When and from whom they may ask advice, and who may be present during their sessions.
- § 926. Secrets of grand jury to be kept, except, etc.
- § 927. Grand juror not to be questioned for his conduct, except, etc.
- § 928. Duties of grand jury.

915. The grand jury must inquire into all public offenses committed or triable within the county, and present them to the court, either by presentment or by indictment.

Powers of grand jury.—The grand jury may inquire into all offenses committed within the county not barred by the statute of limitations—14 Cal. 570. They may act on present offenses of public notoriety; and such as are within their own knowledge, or are given in charge by the court, or by the district attorney—67 Pa. St. 30; see 6 Phila. 167; 76 Pa. St. 319; 4 Parker Cr. R. 222. It is their duty to inquire into offenses in their county, whether the party is under arrest or not—2 Mo. 120; 2 Parker Cr. R. 568; 32 Me. 40; see 12 Mo. 404; 30 id. 368; 2 Cranch C. C. 46; 4 id. 469. A grand jury may of their own knowledge indict a person committing perjury before them—30 Mo. 368.

916. A presentment is an informal statement in writing, by the grand jury, representing to the court that a public offense has been committed which is triable in the county, and that there is reasonable ground for believing that a particular individual named or described therein has committed it.

Presentment.—A presentment found not on the knowledge of any of the grand jury, but upon information delivered by others to them, should be abated on plea of defendant—*State v. Love*, 4 Humph. 253; see also 1 Hawks, 352.

917. An indictment is an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense.

The charge mentioned in this section is not the same as the charge mentioned in § 858—44 Cal. 557.

918. The foreman may administer an oath to any witness appearing before the grand jury.

Perjury may be committed in proceedings before the grand jury—31 Cal. 563; 24 Ark. 591; 4 Blackf. 355; 2 Cush. 212; 8 Watts, 56; 2 Rob. (Va.) 795; 16 Conn. 457; 3 Watts, 56; 1 Car. & K. 619. See 2 Parker Cr. R. 570. The witness to be sworn, so that if his evidence is false he may be prosecuted for perjury—16 Conn. 457; 2 Parker Cr. R. 570. The foreman may administer the oath—50 Ga. 585; 77 id. 484. See 56 Pa. St. 169. *Contra*, 5 Cold. 26.

919. In the investigation of a charge for the purpose of either presentment or indictment, the grand jury can receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in the third subdivision of section six hundred and eighty-six. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Depositions taken before a magistrate upon examination of accused may be used before the grand jury—4 Cal. 218. Defendant may testify before the grand jury—28 Cal. 265. No evidence taken before the grand jury can be used to invalidate the indictment—16 Conn. 457; 30 Tex. 428.

920. The grand jury is not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

921. The grand jury ought to find an indictment when all the evidence before them, taken together, if unex-

plained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury.

Evidence to warrant conviction.—If all the evidence before them would not warrant a conviction, they ought not to find an indictment—19 Cal. 539. The grand jury are not to determine the degree of the offense—34 Cal. 211.

922. If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow-jurors, who must thereupon investigate the same.

923. The grand jury must inquire into the case of every person imprisoned in the jail of the county on a criminal charge and not indicted; into the condition and management of the public prisons within the county; and into the willful and corrupt misconduct in office of public officers of every description within the county.

Duty to inquire into cases of prisoners—49 Cal. 651.

924. They are also entitled to free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records within the county.

925. The grand jury may, at all reasonable times, ask the advice of the court, or the judge thereof, or of the district attorney; but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The district attorney of the county may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he thinks it necessary; but no other person is permitted to be present during the sessions of the grand jury except the members and witnesses actually under examination, and no person must be permitted to be present during the expression of their opinions or giving their votes upon any matter before them.

Advice of district attorney—1 Conn. 428; 7 Cowen, 563.

Persons excluded.—No persons are permitted to be present but the members, and witnesses actually under examination—67 Pa. St. 30; 6 Phila. 167. Any volunteer attendance or communication is a contempt

of court—67 Pa. St. 30; 3 Pa. L. J. 443; 2 Sawy. 663; but the prisoner is entitled to be present, and ask questions of witnesses—1 Conn. 428; 16 id. 458.

926. Every member of the grand jury must keep secret whatever he himself or any other grand juror may have said, or in what manner he or any other grand juror may have voted on a matter before them; but may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person, upon a charge against such person for perjury in giving his testimony, or upon trial therefor.

Obligation of secrecy.—Witnesses cannot take advantage of this obligation in a criminal prosecution against them—31 Cal. 564; 7 Ired. 101. They are not permitted to disclose the evidence taken before the grand jury—43 Me. 11; see 4 Gray, 535. A grand juror may be compelled to testify, when necessary for public justice, as to what a witness testified to—53 N. H. 484; S. C. 2 Green C. R. 346. They are competent witnesses to prove perjury committed before them—31 Cal. 564; 11 Cush. 137; 1 Car. & K. 519; 2 Cranch 40; C. C. 76; 64 Me. 267; 12 Gray, 167; 106 Mass. 75; 16 Conn. 457; 4 Denio, 133; 3 Watts, 56; 2 Rob. (Va.) 795; 25 Gratt. 921; 5 Blackf. 21; 4 Ind. 222; 43 Id. 354; 7 Ired. 96; 2 Hill, (S. C.) 288; 20 Miss. 704; 37 id. 357; 27 Mo. 261; 1 Bibb, 369; 1 Meigs, 127; 6 Heisk. 181; *contra*, 2 Halst. 347; but they cannot impeach their own verdict by affidavit—Charlt. R. M. 1; 1 Hawks, 344; 20 Mo. 338; 17 Minn. 241; 41 Iowa, 311; 39 id. 318; nor disclose the vote on finding of the indictment—16 Conn. 457; 4 Denio, 133; 20 Mo. 238; 45 Iowa, 88; 39 id. 318; *contra*, 6 Abb. N. C. 33; see 30 Tex. 428. So, the district attorney is a competent witness to prove perjury of a witness before the grand jury—59 Ind. 354; see 1 Bibb, 369; but he is incompetent to testify to a fact which will impeach the verdict—13 Me. 52; 12 Vt. 485; 1 Law Reporter, 4.

927. A grand juror cannot be questioned for anything he may say, or any vote he may give in the grand jury, relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow-jurors.

928. It shall be the duty of the grand jury annually to make a careful and complete examination of the books, records, and accounts of all the officers of the county, and especially those pertaining to the revenue, and report thereon; and if, in their judgment, the services of an expert

are necessary, they shall have power to employ one at an agreed compensation not to exceed five dollars per day, payable as other county charges. The judge, upon the impanelment of such grand jury, shall charge them especially as to their duties under this section. [In effect April 16th, 1880.]

PEN. CODE.—30.

CHAPTER IV.

PRESENTMENT, AND PROCEEDINGS THEREON.

- § 931. Presentment must be by twelve grand jurors, etc.
- § 932. Must be presented to the court and filed.
- § 933. Court must direct a bench-warrant if facts constitute a public offense.
- § 934. Bench-warrant, by whom and how issued.
- § 935. Form of bench-warrant.
- § 936. Bench-warrant, how served.
- § 937. Proceedings of magistrate on defendant being brought before him.

931. A presentment cannot be found without the concurrence of at least twelve grand jurors. When so found, it must be signed by the foreman.

See 54 Cal. 103; *post*, § 940, and note.

932. The presentment, when found, must be presented by the foreman, in presence of the grand jury, to the court, and must be filed with the clerk.

933. If the facts stated in the presentment constitute a public offense, triable in the county, the court must direct the clerk to issue a bench-warrant for the arrest of the defendant.

934. The clerk, on the application of the judge or district attorney, may accordingly, at any time after the order, whether the court be sitting or not, issue a bench-warrant, under his signature and the seal of the court, into one or more counties.

935. The bench-warrant, upon presentment, must be substantially in the following form: County of _____. The People of the State of California to any sheriff, constable, marshal, or policeman in this State: A presentment having been made on the ____ day of _____, ~~eight~~

een ———, to the Superior Court of the County of ———, charging C. D. with the crime of ———, (designating it generally) you are therefore commanded forthwith to arrest the above named C. D., and to take him before E. F., a magistrate of this county; or, in case of his absence or inability to act, before the nearest and most accessible magistrate in this county. Given under my hand, with the seal of said court affixed, this ——— day of ———, A. D. eighteen ———. By order of the court. [Seal.] G. H., clerk. [In effect April 12th, 1880.]

A bench-warrant is sufficient, if it describes the offense generally —9 Ga. 75.

936. The bench-warrant may be served in any county, and the officer serving it must proceed thereon as upon a warrant of arrest on an information, except that when served in another county, it need not be indorsed by a magistrate of that county.

See 54 Cal. 103.

937. The magistrate, when the defendant is brought before him, must proceed upon the charges contained in the presentment, in the same manner as upon a warrant of arrest on an information.

TITLE V.

Of the Indictment.

CHAP. I. FINDING AND PRESENTMENT OF THE INDICTMENT, §§ 940-5.

II. RULES OF PLEADING AND FORM OF THE INDICTMENT, §§ 948-72.

CHAPTER I.

FINDING AND PRESENTMENT OF THE INDICTMENT.

- § 940. Indictment must be found by twelve jurors, indorsed, etc.
- § 941. If not found, deposition, etc., must be returned to court, etc.
- § 942. Effect of dismissal.
- § 943. Names of witnesses inserted at foot of indictment.
- § 944. Indictment, how presented and filed.
- § 945. Proceedings when defendant is not in custody.

940. An indictment cannot be found without the concurrence of at least twelve grand jurors. When so found it must be indorsed, "A true bill," and the indorsement must be signed by the foreman of the grand jury.

Concurrence.—This section shows how an indictment is found—54 Cal. 38. All the grand jurors need not be present at the finding of the indictment, provided twelve were present and concurring—6 Cal. 215; 8 Id. 440; 18 Iowa, 475; 35 Id. 316; 2 Cush. 149; 1 Blackf. 317; 8 Leigh, 722; Cro. Eliz. 654; 2 Burr. 1008; 3 Greene, 513; disapproved, see 56 Ga. 601; 1 Utah, 319; 98 U. S. 145. An indictment found by twelve is valid, although the grand jury, owing to death or absence, may consist of less than nineteen at the time—54 Cal. 65; Id. 37; 46 Id. 148; see 8 Id. 440; 6 Id. 215. If less than twelve concur, the defect is fatal—8 Cal. 435; 36 Me. 128; 8 Leigh, 722; 2 Ired. 153; 12 Smedes & M. 68; Cro. Eliz. 654. An indictment for murder may be found by thirteen members of a jury of sixteen persons, three having been excused by the court—20 Cal. 146, approving 8 Cal. 435. At common law, any number from twelve to twenty-three is a legal grand jury—36 Me. 128; 2 Ind. 153; 3 Humph. 513; see 14 La. An. 827; 2 Cush. 149; 1 Blackf. 317. In Missouri, twelve are sufficient—66 Mo. 631; but an indictment found by a grand jury of twenty-four is void—5 Cal. 69; 6 Ad. & E. 236. Where nine out of twenty-three were rejected, it is a legally constituted grand jury—8 Cal. 440. If the finding be by less than twelve, the indictment may be quashed by motion before plea—6 Abb. N. C. 33. See Code Civ. Proc. §§ 192, 242.

Indorsement.—The usual practice is to indorse it "a true bill" signed by the foreman—2 Greene, 270; 8 Humph. 118; 4 Ill. 83; 10 La. 198; 1 Melrs, 109; 8 Mo. 247; 50 Pa. St. 9; 12 Vt. 300; though the indorsement "a bill" has been held sufficient—9 Pa. St. 354; 14 Mo. 94; see 29 Gratt. 294; and in some, its total omission, where the signature of the foreman is given, is held sufficient—13 N. H. 468; 11 Cush. 473; 21 Gratt. 846; 29 Id. 824; 6 Iowa, 511; 17 Minn. 76; 2 Hawks, 429; 75 N. Y. 159.

Signature.—Where the caption and body of the indictment designates the county where it was found, the name of the county need not be added to the signature of the district attorney—47 Cal. 100. See 14 Cal. 571. Going to trial waives the defect of want of signature—48 Cal. 549. See *post*, § 995.

941. If twelve grand jurors do not concur in finding an indictment against a defendant who had been held to

answer, the depositions and statement, if any, transmitted to them must be returned to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed.

Indorsement.—This section prescribes how an indictment must be indorsed and presented—54 Cal. 38. The objection that the indictment is not indorsed must be taken by motion, before demurrer or plea, or the defect is waived—28 Cal. 272; 34 Id. 308; 5 Me. 373; 2 Greene, 270; 4 Ill. 83; 1 Meigs, 109; 23 Ind. 32; 23 Ala. 772; 8 Mo. 247; Id. 283; 6 Dana, 290; 8 Humph. 118; 28 Miss. 728; 1 Morris, 332.

942. The dismissal of the charge does not prevent its resubmission to a grand jury as often as the court may direct. But without such direction it cannot be resubmitted.

Dismissal of charge.—When the grand jury has dismissed a charge, the court may dismiss the action, and discharge the prisoner from custody and sureties from their obligations, unless it has reason to believe that the jury at the succeeding term may properly indict him—54 Cal. 413. This section is to be considered in connection with § 1382 of this Code—54 Cal. 413.

Construction.—This section is to be considered in connection with § 1383 of this Code—54 Cal. 413. Upon such dismissal, the power of the court to resubmit ceases—54 Cal. 412, explaining 52 Id. 463. It is in the nature of a nonsuit—54 Cal. 412. When an action has been dismissed, a new action may be commenced on any subsequent day—54 Cal. 412. See *JEOPARDY*, ante, page 17.

943. When an indictment is found, the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court.

Names of witnesses to be inserted before the indictment is presented to the court—46 Cal. 149. If not inserted at the foot of the indictment, or indorsed thereon, and defendant fails to take advantage of the omission at the time of his arraignment, the objection is deemed waived—22 Cal. 348; 28 Id. 112; see 6 Id. 96; 21 Id. 368. It is not an objection to a witness being sworn at the trial, whose name is not on the indictment—22 Cal. 348; 28 Id. 272; 29 Id. 563; 34 Id. 308; 28 Mich. 496; 2 Va. Cas. 3; Id. 29. See *post*, § 945. Whenever, by statute, the indorsement of the names of witnesses is required, its omission can be taken advantage of by motion to quash demurrer or plea, if not by motion in arrest—5 How. (Miss.) 730; 13 Smedes & M. 259; 6 Mo. 649; 10 Id. 167; 19 Id. 224; 3 Dana, 474; 10 Yerg. 239; 3 Fla. 262. *Contra*, 1 Ala. 655.

Bill of particulars.—The defendant is not entitled to a bill of particulars of the evidence relied on to sustain the indictment—55 Cal. 230.

944. An indictment, when found by the grand jury, must be presented by their foreman, in their presence, to the court, and must be filed with the clerk.

Indictment, how presented.—This section prescribes the manner of presentments—54 Cal. 38. An indictment is not vitiated by the fact that one challenged and excluded from the deliberation of the case appears in the court with the other grand jurors when the indictment is presented—20 Cal. 146. If the indictment is not presented in the manner prescribed, it may be set aside on motion—46 Cal. 148. An indorsement that it was presented by the foreman of the jury, and in their presence, is not essential. This fact will be presumed—21 Cal. 368; 27 Id. 67.

To be filed—81 N. C. 516; 42 Ind. 393; 59 Ill. 68; 2 Va. Cas. 527; 3 Iowa, 249; 2 Cold. 184; 6 Ired. 440; see 5 W. Va. 510; 53 Miss. 586; 41 Tex. 463; 1 Tex. Ct. App. 664; 8 Ill. 71; 8 Yerg. 166; 7 Humph. 155.

945. When an indictment is found against a defendant not in custody, the same proceedings must be had as are prescribed in sections nine hundred and seventy-nine to nine hundred and eighty-four, inclusive, against a defendant who fails to appear for arraignment.

Indictment may be found against one not in custody—55 Cal. 296; but if he is never arrested, the proceedings can go no further—Id. A party arrested on a bench-warrant, on which an order is indorsed admitting him to bail, is entitled to discharge on execution of a recognizance—27 Cal. 272.

CHAPTER II.

RULES OF PLEADING AND FORM OF THE INDICTMENT.

- § 948. Form of and rules of pleading.
- § 949. First pleading by the people is indictment, or information.
- § 950. Indictment, or information, what to contain.
- § 951. Form of.
- § 952. It must be direct and certain.
- § 953. When defendant is indicted by fictitious name, etc.
- § 954. Must charge but one offense and in one form, except where it may be committed by different means.
- § 955. Statement as to time when offense was committed.
- § 956. Statement as to person injured or intended to be.
- § 957. Construction of words used.
- § 958. Words used in a statute need not be strictly pursued.
- § 959. Indictment or information, when sufficient.
- § 960. Not insufficient for defect of form not tending to prejudice defendant.
- § 961. Presumptions of law, etc., need not be stated.
- § 962. Judgments, etc., how pleaded.
- § 963. Private statutes, how pleaded.
- § 964. Pleading for libel.
- § 965. Pleading for forgery, where instrument has been destroyed or withheld by defendant.
- § 966. Pleading for perjury or subornation of perjury.
- § 967. Pleading for larceny or embezzlement.
- § 968. Pleading for selling, exhibiting, etc., lewd and obscene books.
- § 969. Previous conviction of another offense. [Repealed.]
- § 970. Indictment against several, one or more may be acquitted.
- § 971. Distinction between accessory before the fact and principal abrogated.
- § 972. Accessory may be indicted and tried, though principal has not been.

948. All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code.

Rules of pleading.—The Criminal Code was designed to work the same change in pleading and practice on criminal actions which is wrought by the Civil Code in civil actions—27 Cal. 510. The form of indictment and rules by which the sufficiency of pleadings are deter-

mined must be sought for in its provisions—28 Cal. 208; 19 id. 598; 21 id. 403; 27 id. 510; 34 id. 200; 37 id. 280; 39 id. 55.

949. The first pleading on the part of the people is the indictment or information. [In effect April 9th, 1880.]

950. The indictment or information must contain—

1. The title of the action, specifying the name of the court to which the same is presented, and the names of the parties.

2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. [In effect April 9th, 1880.]

Caption.—Entitling an indictment specifying the name of the court, as of the County of San Francisco, or as the City and County of San Francisco, is sufficient—14 Cal. 572; and see 10 id. 21.

Subd. 1. The indictment must be certain as to the defendant's name—38 Ind. 567; but when once given in full, it may be repeated by the christian name only—65 Me. 111; but each count must describe him by his full name—6 Gray, 478; 1 Denison, 356; see 1 Eng. 165. Misnomer of defendant must be taken advantage of by plea in abatement—15 Me. 122; 29 id. 329; 1 Mass. 76; 1 Met. 151; 119 Mass. 199; 32 Iowa, 17; 54 Ala. 155; 2 Va. Cas. 20; 1 Tex. Ct. App. 531. If a man renders it doubtful what his true name is, he cannot complain of the misnomer—2 Crompt. & J. 215. A corporation may be indicted in its corporate name—12 Serg. & R. 589; 10 Mass. 78; 16 id. 142; 40 N. J. 169; 2 Va. Cas. 256; 28 Vt. 583; 9 Car. & P. 478; 7 El. & B. 453; 9 Q. B. 315; see 45 N. Y. 153; 28 Ind. 321; 63 Ill. 481. An allegation charging defendant as "superintendent of common schools," is sufficient—39 Cal. 425; see 35 id. 114. Names are used for the purpose of identification—6 Cal. 212; and the use of initials by which the party may be more readily known and identified, though varying from the true initials, is not a fatal error—37 Cal. 280; so, an error in the initial of a middle name is immaterial—20 Cal. 435; see 29 id. 262; 34 id. 190; 6 Pac. C. L. J. 610. Where the name of defendant was prefixed by the initial letters of his christian names, it was held good on motion for arrest of judgment—37 Cal. 280; see 10 N. H. 247; 3 Met. (Ky.) 484; 27 Conn. 42; 47 Ill. 122; 4 McCord, 487; 3 Rich. 172; 6 N. C. 313; 67 id. 58; 31 Tex. 560; 13 Blatchf. 276. The omission of a middle name is not a fatal defect—6 Cal. 205; 39 Ill. 457; 17 Ala. 179; 14 Barb. 259; 2 Cowen. 463; 20 Iowa, 98. See 7 Eng. 622; 48 Ind. 483; 10 Mo. 81; 1 Ld. Raym. 562; as the law does not recognize more than one christian name—14 Tex. 402; 20 Iowa, 98; *contra*, 1 Pick. 388; and see 3 id. 562; 40 Me. 433.

Principal and accessory.—Under an indictment which charges defendant as principal, he cannot be found guilty if the evidence shows him to have been an accessory—41 Cal. 431; 39 id. 75; 40 id. 129. An indictment against an accessory must, in addition to other matter, contain all the averments necessary in an indictment against the principal, and it must therefore allege that the crime of the principal was committed before it was found and presented—50 Cal. 416; 31 id. 567. He must be indicted in the county where the accessorial act was committed—27 Cal. 340; see 40 id. 599. See *ante*, § 31.

Subd. 2. Statement of offense.—Facts necessary to constitute the crime must be stated—6 Cal. 207; id. 238; 9 id. 31; id. 275; 20 id. 79; see

47 id. 102; in ordinary and concise language, and in such a way that a person of ordinary understanding can know what is intended—14 Cal. 29. All the matters must be set forth in which its illegality consists—52 Cal. 201. Every averment that is substantially necessary to enable defendant to defend himself must be stated—9 Cal. 55; and the omission will be fatal—8 Ill. 76; id. 356; 25 Vt. 373; 8 Barn. & C. 114; but unnecessary averments or aggravations are surplusage, and will be disregarded—13 Blatchf. 178; 2 Murph. 186; 22 Minn. 67. If it does not substantially conform to the requisites of this section, it is demurrable—49 Cal. 390. It is not enough to state a mere conclusion of law—92 U. S. 544; 56 Ind. 107; as charging one with "stealing," or "murdering"—52 Cal. 201; 2 Curt. 265; 1 Hughes, 448; 73 N. C. 269; 31 Ind. 72; 30 Tex. 518; 1 Rolle, 79; 2 Strange, 699; or with being a defamer, or evil-doer, etc., or any such vague charge—110 Mass. 181; see 1 Mod. 71; 2 Strange, 848; 2 Hawk. P. C. ch. 25, § 59. Facts not vital to the accusation, as mere matters of description, may be stated as unknown to the grand jury—36 Cal. 247; 3 Denio, 91; provided it is described as accurately as possible—5 Cush. 295; 125 Mass. 384; id. 387; id. 394; 7 Jones, (N. C.) 446; but it must be shown that it was actually unknown to them—26 Mich. 298; 3 Ind. 403; 13 Mo. 246; 16 Ark. 499. A bare negative qualification need never be averred in an indictment, but must be relied on as matter of defense—4 Cal. 341; 6 id. 562; 30 id. 218; 53 id. 600. When the occurrence of several acts, or the doing of an act under peculiar circumstances, is necessary to constitute the offense, the indictment must state them—40 Cal. 55. An allegation in an indictment descriptive of the identity of what is legally essential to the defense cannot be rejected as surplusage—20 Cal. 76.

951. It may be substantially in the following form: The People of the State of California against A. B., in the Superior Court of the county of —, the — day of —, A. D. ~~eighteen~~ ¹⁸⁸⁰ —. A. B. is accused by the grand jury of the county of —, by this indictment, (or by the district attorney by this information) of the crime of (giving its legal appellation, such as murder, arson, or the like, or designating it as felony or misdemeanor), committed as follows: The said A. B., on the — day of — A. D. eighteen —, at the county of —, (here set forth the act or omission charged as an offense) contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California. [In effect April 9th, 1880.]

Form of indictment.—For murder—34 Cal. 209; followed—47 id. 102; cited—37 id. 280; 43 id. 390; for forgery—6 Pac. C. L. J. 610; for larceny—6 id. 569; for assault to commit murder—30 Cal. 216.

Appellation of crime.—The name given to the offense is not of itself the charge of an offense, and a mistake in regard to it is a mere irregularity, and not fatal—54 Cal. 54; 39 id. 331; 14 id. 572. It is not necessary to state in terms that it is a felony, or a misdemeanor—20 Cal. 117; and it need not state the degree of the crime—21 id. 402; and the word "feloniously" need not be used—7 id. 403; 3 Hill, 52; 22 Wend. 175; 1 N.

Y. 379; 15 Pa. St. 95; 7 Serg. & R. 423; 5 Ohio, 1; Cald. 397; 2 East P. C. 1028; but see 2 Md. 376. So, "unlawfully" and other aggravating terms need not be used—1 Low. 305; 4 Iowa, 502; 58 Ind. 514; 3 Helsk. 376; 1 Mo. 126; 27 Vt. 103; 23 N. H. 321. In an indictment for dealing faro, designating the offense as a felony is sufficient—14 Cal. 572. An erroneous appellation or no appellation of the offense is of no consequence, if the acts as defined by statute are sufficiently stated—39 Cal. 326; 14 Id. 566. The maxim of *idem sonans* does not apply to an indictment charging "larcey" for larceny—6 Pac. C. L. J. 322.

952. It must be direct and certain, as it regards—

1. The party charged.
2. The offense charged.
3. The particular circumstances of the offense charged, when they are necessary to constitute a complete defense.

Must be direct and certain.—51 Cal. 372; 20 Id. 80. If the language is capable of two interpretations, only one of which imports a charge, the indictment is not good—35 Cal. 671. The law does not require greater certainty than the nature of the case affords—34 Cal. 191; 36 Id. 247.

Subd. 1. As to party charged—14 Cal. 30; 34 Id. 209; 53 Cal. 616. See *ante*, § 950, subd. 1, note.

Subd. 2. As to the offense—14 Cal. 30; 20 Id. 80; 34 Id. 209; 53 Id. 616. Where the indictment charged the offense as "larcey," instead of "larceny," it was held that no offense was charged—6 Pac. C. L. J. 322. The substantial facts must appear with such certainty as will enable a man of ordinary intelligence to understand what is intended, and to enable the court to pronounce a proper judgment—4 Cal. 238; 9 Id. 576; 10 Id. 50; 34 Id. 183; 35 Id. 671; 40 Id. 55.

Subd. 3. As to the circumstances—14 Cal. 30; when necessary to constitute a complete offense—34 Id. 209; 47 Id. 102; 49 Id. 395. If it does not substantially conform to the requirements of this section it is demurrable—49 Cal. 395. As to larceny by bailee—19 Cal. 601. Assault with deadly weapon—12 Cal. 326. See notes under §§ 950, 959. Where an act contains several provisions, an indictment for violating it must state the peculiar provisions which the person intended to violate—52 Cal. 201. See *ante*, § 950, note; and *post*, § 959 and note.

953. When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being charged by the name mentioned in the indictment or information. [In effect April 9th, 1880.]

Constitutionality.—This section is not in violation of art. 1, § 13, of the Constitution of California—6 Cal. 213. See Const. Prov. *ante*, p. 17.

Indictment in wrong name.—If defendant is indicted by a wrong name, and so states when asked, and gives his true name, the true name must be substituted, and all after-proceedings be had in that name—32 Cal. 60; see 5 Iowa, 434.

954. The indictment or information must charge but one offense, but the same offense may be set forth in dif-

ferent forms under different counts, and, when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count. [In effect April 9th, 1880.]

Indictment must charge but one offense—49 Cal. 453; 27 id. 401. If the indictment charges more than one offense, the objection is deemed waived, unless it is taken by demurrer—6 Pac. C. L. J. 152; 63 Cal. 647; 47 id. 108; 35 id. 118; 27 id. 403; 17 id. 361; 29 id. 622. An indictment which charges burglary, mixed with larceny, charges two offenses—29 Cal. 622; or charging A. with the larceny of certain goods, and B. with feloniously receiving them—34 Cal. 182; but where, in one count it charges the goods taken to be the property of A., and in another to be the property of B., and in a third count to be the property of C., it does not charge different offenses—17 Cal. 361. Where two distinct acts are perpetrated by the same person, at the same time, they constitute but one offense—27 Cal. 401; 4 Dana, 518; 2 Har. & J. 426; 3 Hill, (S. C.) 1; 5 Port. 40; 15 Pick. 273; 20 id. 300; 22 id. 1. So, when a tax-collector receives money for licenses due the State, and other money for licenses due the county, and embezzles the whole, it is but one offense—28 Cal. 507; so, an indictment which charges with forging and uttering does not charge two offenses—id.; see 27 id. 401; so, an indictment which charges one with buying and receiving stolen property, charges but one offense—13 id. 38; or charging one with having and circulating licenses other than those authorized by law, charges but one offense—31 id. 450. Reciting an accusation of assault with intent to murder, and stating facts showing that he administered poison with intent to kill—54 Cal. 54; or charging an assault and battery only as part of, or mode of executing, a forcible arrest or abduction—29 id. 604; or charging rape, and assault to commit it, is not charging two offenses—35 Cal. 553. If the indictment contains more than one count, it should clearly appear that they are descriptive of the same transaction—28 Cal. 214.

Alternative allegations.—Allegations in the alternative are permitted when they qualify an unessential description of a particular offense, and do not touch the offense itself—54 Ala. 579; 13 W. Va. 859; as describing a horse stolen as being "either a brown or a bay color"—13 Vt. 647; or that certain trees cut down were the property of the defendants or either of them—7 Pa. St. 439; 16 Ind. 9; or "as an innholder or victualer"—2 Met. 119; 5 id. 246; or, "in a certain paper or publication"—3 Johns. Cas. 338; or, cutting or causing to be cut—6 McLean, 186; see 4 Mo. 474; or alleging a nuisance to be on the "highway or road," have been held to be good—3 Yeates, 417; see 24 Conn. 286; 55 Ala. 64; 4 Mo. 474. The use of "or" in an allegation is fatal when it renders a statement uncertain—8 Mass. 59; 2 Gray, 501; 4 Mo. 474; 4 Parker Cr. R. 28; see 7 Gratt. 592. When the words of a statute are synonymous, it may not be error to charge them alternatively—35 Cal. 509; 4 Mo. 474; 62 id. 393; 43 Tex. 519; see 2 Binn. 338; so, "or" may be introduced in enumerating negative averments to exclude exceptions in a statute—20 N. H. 550; 5 W. Va. 508. When the statute enumerates several acts disjunctively, the indictment should charge them in the conjunctive—28 Cal. 205; 1d. 513; 35 id. 508.

955. The precise time at which the offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense. [In effect April 9th, 1880.]

Time.—If the indictment charge the offense to have been on a particular day, which date is anterior to the finding of the indictment, it is sufficient—5 Cal. 355; 6 Id. 202; 2 Wash. C. C. 328; 1 Gray, 483; 19 Mo. 673; 34 Ga. 202; 11 Id. 53; 13 Id. 396; 20 Ala. 81; 1 Stewt. & P. 208; 33 Mich. 363; 9 Cowen, 660; 12 Gray, 326; 3 Hawks, 384; 11 Ga. 53; but if the day assigned be subsequent to the finding, the indictment is bad—29 Ind. 212; 110 Mass. 103; 5 Serg. & R. 316; 28 Tex. 642; 15 Vt. 291; 33 Id. 67. When time is important, courts will inquire into a day, or fractional portion of a day—14 Cal. 571. The allegation of a day within a period of limitation is material when the offense is subject to limitation—12 Cal. 294. Matter avoiding the statute must be set out whenever it would otherwise appear that the offense is barred—18 Cal. 38. See *ante*, §§ 800, 959.

956. When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material.

Statement as to person injured, and third parties.—Where a third person is unknown, it is sufficient to charge as to him "a certain person to the jurors unknown"—2 Cush. 551; 11 Id. 137; 9 Allen, 280; 13 Id. 248; 5 Blackf. 343; 15 Ind. 190; 2 Ill. 399; 20 Iowa, 574; 14 Mo. 340; 3 Parker Cr. R. 622. So, of a deceased person—16 Ark. 499; 2 Hayw. 348; 1 Car. & K. 82; or the owner of goods stolen—14 Mass. 217; 12 Pick. 173; 2 Barn. & Ald. 580; if he was at the time unknown to the jury—2 Gray, 303; 116 Mass. 21; 1 Car. & K. 187; but otherwise if he be really known to the jury—30 Conn. 500; 35 N. Y. 465; 1 Ohio St. 61; 6 Tex. Ct. App. 233; or if the jury had notice—13 Allen, 249; 111 Mass. 401; 3 Ind. 403; Hoit N. P. 555; but the burden is on defendant to prove knowledge at the time—11 Cush. 137; 126 Mass. 54. Discovery of the name subsequently is, however, no ground for acquittal—11 Cush. 137; 2 Gray, 503; 35 Ala. 227; 7 Ind. 650; 14 Mo. 340; 1 Car. & K. 82; 1 Moody C. C. 402; or arrest of judgment—55 Barb. 606; S. C. 32 N. Y. 465. A christian name may be averred to be unknown—36 Ala. 270; 23 La. An. 68; see 2 Gray, 303; 116 Mass. 21. The mere omission of the initial of the middle name is no error—6 Pac. C. L. J. 610. If the company name is the name or style of a firm, the names of the several members should be stated; but if the name be of a corporation, the indictment is good if it state that fact—36 Cal. 248; 32 Id. 160; 63 Ill. 450; 5 Parker Cr. R. 330; 27 Vt. 722. The averment is necessary when made so by statute—10 Mass. 70; 16 Id. 141; 8 Barb. 637; 5 Parker Cr. R. 57; Id. 334; 65 Ind. 204; 40 N. J. L. 169; 4 Rawle, 464. An erroneous allegation as to the party injured is not material—41 Cal. 236. If the allegation in which the misnomer appears is material, it may be rejected as surplusage—4 Pick. 252; 3 Sum. 12; 45 Ga. 30. Where the pleader undertakes to set out the names of a firm, a variance in the proof is fatal—25 Ind. 495.

Courts are required to observe and enforce the tests of the validity of indictments as prescribed in §§ 956 and 959 of this Code—27 Cal. 511; 37 Id. 280; see 34 Cal. 200. If there are two counts and one of them is good, it is good on general demurrer—6 Pac. C. L. J. 610; 5 Cush. 295. For an erroneous allegation to be immaterial, the offense must be described in other respects with sufficient certainty—41 Cal. 236; 17 Id. 336; 35 Id. 114.

957. The words used in an indictment or information are construed in their usual acceptance in common language, except such words and phrases as are defined by

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law, which are construed according to their legal meaning. [In effect April 9th, 1880.]

Words construed.—Words and phrases are to be construed according to their common acceptation, except such as are specifically defined by law—5 Cal. 356. See *ante*, § 7.

958. Words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used. [In effect April 9th, 1880.]

Statutory offenses.—The indictment is sufficient if it charge the offense in the language of the statute and fully comply with § 959 of the Code—53 Cal. 629; 21 *id.* 403; 25 *id.* 531; 19 *id.* 601; 10 *id.* 369; 3 Parker Cr. R. 208; 6 Cal. 488; 9 *id.* 584; 32 *id.* 91; 34 Cal. 114; *id.* 200; 14 *id.* 30; 29 *id.* 326; 12 Blatchf. 491; 5 Bush, 316; 13 *id.* 318; 14 Conn. 487; 38 *id.* 400; 3 Cold. 125; 2 Gall. 5; 29 Gratt. 844; 1 Greene, 418; 2 *id.* 162; 3 Halst. 299; 3 Gratt. 590; 82 Ill. 610; 84 *id.* 216; 46 Iowa, 662; 3 Ga. 419; 1 Morris, 412; 119 Mass. 347; 22 Minn. 271; 67 Mo. 41; 1 McMull. 472; 57 N. H. 174; 1 Vt. 331; 38 Vt. 437; 3 Yeates, 451; 5 Whart. 427; 19 W. Va. 794; 2 Swan, 226; 2 Strob. 474. It is not necessary to follow strictly the language of a statute by which the offense is defined; words conveying the same meaning may be used—35 Cal. 114; 34 *id.* 114; 53 *id.* 629. If it alleges all the acts or facts which enter into the description of the offense, it is sufficient—34 Cal. 201. If a statute enumerates a series of acts as constituting the offense, all such acts may be charged in a single count—28 Cal. 510; if it enumerates them disjunctively and the indictment charges more than one of them, it must charge them conjunctively unless the words used disjunctively are synonymous—35 Cal. 593. It should state the particular provision of the act which has been violated—32 Cal. 201.

959. The indictment or information is sufficient, if it can be understood therefrom—

1. That it is entitled in a court having authority to receive it, though the name of the court be not stated.

2. If an indictment, that it was found by a grand jury of the county in which the court was held; or if an information, that it was subscribed and presented to the court by the district attorney of the county in which the court was held.

3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury or district attorney, as the case may be, unknown.

4. That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein.

5. That the offense was committed at some time prior to the time of finding the indictment or filing of the information.

6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case. [In effect April 9th, 1880.]

Subd. 1. Entitling indictment.—An indictment may be entitled either "county" or "city and county"—14 Cal. 572; 17 id. 363; 6 id. 202. The caption is no part of the indictment—6 Halst. 203; 2 Har. (Del.) 532; 1 Hawks, 354; 2 id. 261; 24 Ala. 672; 36 N. H. 359; 37 N. Y. 117; 13 Vt. 64; 30 id. 100; 3 Wend. 319; 2 Zab. 9. See 3 Baxt. 429; 6 Ad. & E. 247; 4 Abb. App. Dec. 509. Its purpose is to state the style of the court, the time and place where the indictment was found, etc.—20 Ala. 33; 39 Me. 73; 6 McLean, 56; 4 Tex. 125; 1 Yerg. 206. It must be set forth with reasonable certainty—6 McLean, 56; 20 Ala. 33; 39 Me. 73; 4 Tex. 125; 1 Yerg. 206. See *ante*, § 950, note.

Subd. 2. Finding of indictment.—The indictment must allege the offense committed within the county in which it was found—48 Cal. 236; 6 id. 202; 30 Mich. 371; 8 Leigh, 721; Leigh & C. 128. See *ante*, § 950.

Subd. 3. Wrong names.—If a defendant is indicted by a wrong name and so states when asked, and gives his true name, the true name must be substituted—32 Cal. 64. See *ante*, § 953, and note.

Subd. 4. Jurisdiction.—"That defendant at a time named was in the county where the indictment was found," sufficiently shows that the offense was committed within the jurisdiction of the court—44 Cal. 435; 4 Halst. 357; 1 Johns. 66; 1 Tyler, 295; Leigh & C. 128. An indictment for an offense committed on a vessel, must set forth all the facts, giving the extra-territorial jurisdiction in § 783 of this Code—7 Cal. 395. An indictment against an accessory must be found in the county where the accessory act was committed—27 Cal. 340; see 40 id. 599. When property is stolen in one county and carried into another, the party may be indicted in either county—29 Cal. 421; 25 id. 531. Where a county is divided, the offense may be laid in the new county, if committed there before the division—4 Halst. 357; 4 Tex. 450; see 15 How. 467; 39 Me. 291; 4 Fred. 219; see 13 Ark. 708. Until the organization of the new county, the indictment may be found in the old county—32 Cal. 140. See *ante*, § 786.

Subd. 5. When the day on which the indictment was found is given, the term of the court is sufficiently stated—14 Cal. 571. "Sabbath" for "Sunday" is no variance—64 N. C. 569.

Subd. 6. See ante, § 950, subd. 2.

Subd. 7. See ante, § 952, subd. 3.

Arson.—Though the indictment give an erroneous appellation, yet if the facts stated constitute the offense it is sufficient—39 Cal. 331. The ownership of building in arson is a part of the description of the of-

fense, and must be alleged directly and certainly—20 Cal. 80; 45 N. Y. 153; 26 Ala. 72; 28 Id. 71. It may be alleged to have been the property of one not the owner, but who was occupying it as a residence—44 Cal. 495; see 15 Wend. 159. If a tenant burns the house, it is sufficient to allege title in the landlord—50 Cal. 305; 51 Id. 320; 3 Ired. 570; see 29 Conn. 342. An indictment for burning a public building need not allege that it belonged to any one—12 Vt. 93. An indictment charging that defendant "did on a certain day burn, or cause to be burned, a certain dwelling-house," is bad—6 Cal. 236. That defendant "feloniously, wilfully, and maliciously did burn and cause to be burned," is sufficient without the statement "set fire"—20 Cal. 80. Where the indictment charged that defendant at the time named was in the county where it was found, and then and there feloniously burned the building, it sufficiently shows that the offense was committed at a place within the jurisdiction of the court—44 Cal. 495. See *ante*, §§ 447-451.

Assault to murder.—Reciting an "assault with intent to murder," and stating facts showing that he administered poison with intent to kill, does not charge two offenses—54 Cal. 54. An assault which charges that defendant did assault with intent to commit murder, is sufficient to sustain a judgment for a felony on a verdict of guilty—49 Cal. 391. An indictment is sufficient if it charges that defendant feloniously assaulted A. with a pistol loaded with powder and ball, with intent of malice aforethought to kill and murder A.—30 Cal. 218. See *ante*, § 217.

Assault to do bodily harm.—A charge of assault to do bodily harm, charges only a simple assault—47 Cal. 112; 6 Id. 562; 40 Id. 426. "An assault with a deadly weapon, with intent to inflict upon the person of another a bodily injury, there appearing no considerable provocation therefor, sufficiently designates the offense—20 Cal. 117.

Assault with a deadly weapon.—The weapon or instrument used in the assault is the *gist* of the offense, and must be alleged—6 Cal. 562. The indictment should allege that the weapon was deadly, or state facts to show that it was—29 Cal. 579. If it is not direct and certain as to the offense charged, it is insufficient—12 Cal. 326. The indictment should state directly and certainly that the assault was with a deadly weapon; that is, used as an instrumentality of the assault—6 Cal. 562; 29 Id. 579; 44 Id. 93; 52 Id. 451. Unless the correct name of the party assaulted is given, the other facts and circumstances must sufficiently identify the act—35 Cal. 114. See *ante*, § 467.

Burglary.—In burglary the essential words are "feloniously and burglariously entered the dwelling-house in the night-time," and the felony intended or perpetrated must be stated—68 Ill. 271; 29 Tex. 47; see 16 Conn. 32. An allegation that he entered in the night-time feloniously and burglariously, and with force and arms, is substantially sufficient—43 Cal. 446; but "burglariously" is not necessary in statutory housebreaking—4 Met. 357. That it was in the night-time must be alleged—16 Conn. 32; 4 Leigh, 658; 5 How. (Miss.) 20; 1 N. J. L. 43. The hour of the night need not be charged, nor if charged, proved—35 Cal. 115; 35 N. J. L. 71; see 36 Me. 225; 2 Cush. 582. An indictment charging an intent to steal must specify the value of the goods—8 Cal. 519. It may charge in different courts ownership in different persons—28 Cal. 214; see 12 Allen, 183. An indictment for "entering a room or apartment with intent to commit larceny," rightly charges the ownership in him who rents such room from one having control of the house—38 Cal. 137. For breaking and entering a house in the night-time with intent to commit larceny, it need not charge whose goods were intended to be stolen, or whether there were any goods to steal—32 Cal. 36. An indictment for burglary must charge a felonious intent—3 Har. (Del.) 554; 48 Ala. 684. The intent must be charged, but when this is omitted on proof of larceny, defendant may be convicted—11 N. H. 269; 8. C. 2 Lead. C. C. 123; 2 Rawle, 207; Russ. & R. C. C. 445; 8. C. 2 Lead. C. C. 122; otherwise as to an indictment for breaking and

entering in the day-time—3 Cold. 77. It is not enough to allege intent to commit a felony; the particular offense must be stated and the facts set forth—24 Ga. 420; 41 Tex. 237; otherwise under statutes—28 N. Y. 200; but the particular crime need not be fully and technically set forth—10 Cush. 52. See *ante*, § 459.

Counterfeiting.—Knowledge of defendant of spurious character of the coin is sufficiently charged in the words "willfully, feloniously, and knowingly did have in his possession," etc.—39 Cal. 606. See *ante*, §§ 477-479.

False entry in corporation books.—The indictment should specify the particular entry complained of, and should at least state the substance of it according to its legal effect—53 Cal. 616. That defendant made a false entry, "by which false entry it appears that the cash on hand at the commencement of that day" was a specified sum, is insufficient—53 Cal. 616. See *ante*, § 563.

Forgery.—An indictment for forgery may charge defendant in the same count with forging an indorsement, and also with uttering and passing the forged draft—28 Cal. 513; and see 27 Cal. 400. "Having knowledge of the false making" means that the offender knew the notes were falsely made—8 Mass. 59; see 39 Cal. 638. The possession of several "similar" bills means that they should be all bank-bills—8 Mass. 59. It is not necessary to allege that the banking-house was an incorporated company, unless that fact be on issue—41 Cal. 651; 2 Har. (Del.) 327; 4 Biss. 302; *contra*, 2 Met. (Ky.) 36; 11 Gray, 306; 1 Duval, 90. See *ante*, § 470.

The indictment should set out the instrument alleged to have been forged, or state the reason for the omission—1 Chip. D. 238; 1 Head, 139; 8 Humph. 93; 2 Mason, 464; 1 McMull. 236; 2 Cowen, 622; 4 Halst. 26; 34 Me. 223; 47 id. 165; as in case of forged treasury-notes—4 Biss. 59; see 8 Iowa, 288; 34 Vt. 501. So, it should recite an altered instrument in its altered state—17 N. H. 323. Where it alleges "in the words and figures following," a strict recital is necessary—1 Mass. 62; id. 203. It is sufficient if it appears by proper averments that the instrument forged is of the kind prohibited by statute—9 Gray, 123; 19 Minn. 98; 8 C. 1 Green C. R. 541. It need not allege that the deed forged was under seal—6 Parker Cr. R. 683. It need not show that the papers forged contained all the facts necessary to give title to the party—4 Blatchf. 385.

If the instrument be in a foreign language, a copy of the translation in the indictment, is sufficient—28 Cal. 208; and if set out in full, a misnomer is immaterial—id. The indictment must show that the forged instrument is one which, if genuine, would injure another—35 Cal. 507; it must show the forgery of a valid instrument—28 Ind. 396; see 2 Dev. 443. The omission of the initial of the middle name of the party to be injured, is an immaterial variance—6 Pac. C. L. J. 610; so, a variance between misspelled words in the forged instrument and the properly spelled words in the indictment, is immaterial—id. 938. The omission of a word in an indictment for forgery is fatal—1 Bald. 292; 2 Mason, 464; Tayl. 158; see 1 Hayw. 403; but vignettes, devices, letters, and figures, or stamps in the margin, need not be inserted—2 Binn. 32; 5 Cush. 605; 3 Johns. Cas. 299; 8 Leigh, 732; 14 Ohio St. 55; 5 N. H. 307; 1 Mass. 62; id. 203; but to omit the name of the State in the upper margin of a bank-note has been held fatal—2 Gray, 70.

Gambling.—An indictment for gambling is good if it states the acts constituting the offense, without stating the particulars, as persons present, the room, and the like—14 Cal. 30. See *ante*, § 330.

Murder.—The venue must be laid in the county where the wound was given—9 Humph. 637; 2 Va. Cas. 205; but see 2 Greene, 288. The crime must be stated directly and certainly—47 Cal. 102. The time when the crime was committed is material only to show that death

ensued within a year and a day—8 Ired. 195. It need not be stated if the indictment shows that it was committed before the finding of the indictment—6 Cal. 210; id. 207. The day on which the act was committed, and not the day on which the result of the act was determined, is the proper day to charge—6 Cal. 637; 3 Gratt. 650. It must allege the place of the death—5 La. An. 330; see 24 Ala. 672; and that it was within the county is sufficient—61 Me. 178.

Allegation of instrument or means.—The instrument or means by which it was committed should be set out—36 Tex. 352; 54 Me. 408; and facts sufficient to show the means of its perpetration—9 Bush, 178; but it need not set out circumstances which determine the degree of the crime—39 Md. 355; 8 C. 2 Green C. R. 381; and a statement of degree of the crime may be treated as surplusage—9 Cal. 54; id. 576; 21 id. 400; 27 id. 507. That he was killed by a shot-gun is bad, for lack of a statement of the circumstances attending its use—27 Ark. 493; 8 C. 1 Green C. R. 741. The manner of the killing need not be stated—47 Cal. 102; 34 id. 200; 40 id. 52. It is sufficient to state the homicide committed by some means, instruments, and weapons, to the grand jury unknown—47 Cal. 102; approving 34 id. 200. It is sufficient, although it states "by" a knife instead of "with" a knife—22 N. Y. 317. That the defendant, "with a certain stone which he held, feloniously did cast, and throw, and strike deceased on the right side of the head," sufficiently shows he threw the stone and hit him—6 Binn. 179. See 6 Met. 224. Charging an actual poisoning need not state the particular poison—2 Ind. 617; see 29 Ala. 27; nor that defendant knew the drug was poison—24 Gratt. 657; 108 Mass. 487. Where it was alleged to be by a battery, an assault must be alleged—9 Mo. 658; see 5 Cush. 295. It may allege several inconsistent modes—31 Gratt. 809. See 10 La. An. 456. The allegation that defendant did administer, etc., and did cause and procure to be administered, etc., charges but one offense—34 N. Y. 223; 6 Parker Cr. R. 371.

Aiders and abettors.—Where several were aiding and assisting, it is not material who struck the blow—3 Brev. 333; 8 Bush, 366; 1 Green C. R. 710; as it may charge the act done by all or by one, abetted by others—5 Ark. 444. It may charge in one count, one as principal, and another as accessory, and in another count, the latter as principal, and the former as accessory—43 Cal. 553; 40 id. 129; 39 id. 75; 32 id. 160. In an indictment of an accessory before the fact, it must allege the death of the person assaulted, and that the crime of murder was committed—46 Cal. 65.

Death.—Charging the death of three persons charges three offenses—49 Cal. 453. Killing several by the same act is one offense, but not if the acts and intent are distinct—7 Cold. 508. It must show that the party died of the injury specifically described—29 Pa. St. 441; and may allege death as from four distinct assaults—12 Cush. 619. Where it was charged that accused, at the county and State aforesaid did feloniously, willfully, and maliciously, and of malice aforethought, shoot, kill, and murder, etc., it is sufficient charge of death—43 Cal. 31; 34 id. 192; 55 id. 230.

Description of deceased.—It is sufficient to describe the deceased person by the name by which he was known—6 Cal. 96, and if unknown the verdict may charge the name as unknown—40 Ala. 698; and it need not state that he was a human being—16 Ark. 499; but if the name of deceased be known it must be stated—30 Mo. 376. Where the surname was given in three ways of spelling, they are to be regarded as *idem sonans*—17 Wis. 679.

Description of wound.—The indictment must state what part of the body was wounded—7 Blackf. 20; *contra*, 35 Ind. 22; 23 id. 89; 22 id. 1; and see 23 N. Y. 147; and may allege several parts of the body inflicting one mortal wound of which he died—36 Tex. 523; 8 C. 1 Green C. R. 650. The wound should be alleged to be mortal, but it need not

state the particulars as to length, breadth, and depth—39 Me. 78; 7 Blackf. 20; 3 Ill. 326; 3 Heisk. 475; *contra*, 1 Murph. 152; see 20 Mo. 58. A description of the weapon, length and depth of the wound, or part of the body on which they were inflicted, are not necessary—9 Cal. 273; 34 id. 191; 27 id. 507; 10 id. 313; id. 310.

Essential elements to be averred.—Where the statute makes intent an essential element, intent must be averred—8 Ohio St. 98; id. 306. Express malice need not be alleged—38 Cal. 699; the proper allegation is "malice aforethought"—id.; 2 Va. Cas. 70; but see 4 Rich. 260; 20 Wis. 415. It is sufficient without the words "malice aforethought," if it contains language which is equivalent, as "willfully, maliciously, feloniously, and premeditatedly"—17 Cal. 166; 21 id. 400; 24 La. An. 191; see 27 id. 500; 26 Wis. 415. The absence of the word "deliberate" is immaterial—9 Cal. 576; 10 id. 309. An allegation of premeditation or malice aforethought is necessary—12 Cal. 325; 3 Kans. 450; 27 Iowa, 402; id. 415; 29 id. 118; but see 37 N. Y. 413; 49 Barb. 122; 39 N. Y. 245; 13 Wend. 153; 22 id. 167; 49 N. H. 399; 50 id. 369.

Deliberation and premeditation.—Deliberation and premeditation are not included in "malice aforethought"—4 Greene, 500. That such a person, on such a date, at such a county, feloniously, willfully, and maliciously, did kill and murder such a person, etc., contains all the ultimate or issuable facts in the case—34 Cal. 200; id. 211; 47 id. 101. See *ante*, § 187.

Rape.—Charging that defendant feloniously assaulted a female by throwing her on her back and attempting to have sexual intercourse with intent to outrage her person, does not charge an assault with intent to rape—48 Cal. 258. It must allege the county within which found—id. But it is good if it allege that the assault was made with intent to commit an act of sexual intercourse by force and violence, and against the will of the woman, without alleging "against her resistance"—47 Cal. 450. It need not strictly follow the language of the statute; words conveying the same meaning may be used—53 Cal. 63; see 2 Va. Cas. 235; 4 Dev. & B. 152. It need not allege that she was not his wife—53 Cal. 600; 11 Cush. 547. The words "forcibly" and "against her will" are essential—1 Dev. 142; except as to a child of less than ten years of age—63 Me. 210. It is otherwise with the word "unlawfully"—2 Va. Cas. 235; so, the word "feloniously" must be alleged—73 N. C. 461; but see 11 Cush. 547. The word "ravish" is essential—3 Parker, 15. That the accused, violently and against the will of the woman, "feloniously did ravish and carnally know" is sufficient averment of force—8 Gray, 489. The words "carnal knowledge" mean sexual bodily connection—57 Mass. 59. The averment that the injured person is over ten years is not necessary, but for violation of a child under ten years, age is material, and must be averred and proved—29 Cal. 575; 46 Miss. 501; 4 Ired. 224; 7 Ohio, 243; 63 N. C. 7; see 11 Cush. 547. See *ante*, § 261.

An indictment charging that defendant "did unlawfully and feloniously have carnal knowledge of a certain female child named A., she, the said A., being under ten years of age, to wit, of the age of nine years and upwards, is valid—17 Cal. 276. It is not necessary to aver the age of the person charged with the crime—29 Cal. 575.

Receiving stolen goods.—The receiver may be indicted, though the principal is not prosecuted or known—3 Mass. 126. Where an indictment charged the defendant with feloniously receiving, having, and aiding in concealing stolen goods, knowing the same to have been stolen, charges the offense of receiving—34 Cal. 182. It must show that defendant received them from the principal felon—13 Ired. 333; Phill. (N. C.) 62. In general, it need not state the name of the person who stole the goods, and the allegation that his name is unknown is equally immaterial—43 Cal. 199; 2 Strob. 273; 9 Yerg. 338; 2 B. L. 474; 6 Ala. 845; 11 Gray, 60; 37 Mo. 58; 23 Ohio St. 130; 8 C. 2 Green C. R.

530; nor need it allege any consideration passing between the thief and the receiver—12 Wend. 76. The indictment must describe the goods with certainty—3 Hill, 194; see 6 Ala. 845; that the stolen property was so many yards of cloth of a certain value, is sufficiently definite—103 Mass. 436. It must allege ownership of the stolen property—40 Me. 133; joint property may be alleged, as the property of one of the owners—108 Mass. 469; or it may be alleged as the property of a corporation—5 Parker Cr. R. 330; or it may be alleged as the property of him from whom it was taken, although as against the true owner, his possession was tortious—108 Mass. 466. It should allege that he received them with intent to deprive the owner of them—5 Humph. 63; see 3 Blackf. 28; 1 Parker Cr. R. 564. That defendants feloniously bought or received two horses of the value of one hundred dollars each, which said horses had been feloniously taken and carried away, they well knowing they had been feloniously taken away, is a sufficient averment of guilty knowledge—41 Ala. 393. An indictment which alleges that defendant received certain stolen property, knowing it to be stolen, without alleging that he received it both for his own gain and to prevent the owner from again possessing it, is sufficient—43 Cal. 199. See *ante*, §§ 49–497.

Robbery.—An allegation of stealing by force and violence is sufficient, with the averment of putting in fear—7 Mass. 242; or that it was forcibly taken from the person, with averring against his will—28 Cal. 490; or that it was taken from the person against his will feloniously and violently—7 Ired. 239; but that he did feloniously seize, take, and carry away is not sufficient—4 Ohio St. 539. It may allege that it was committed on the highway or near it—7 Ired. 234. It must allege that the property was taken from the person of another—39 Ga. 589. An indictment which merely states that the property was taken from “another person” is fatally defective; it must state that it was taken from “the person of another”—21 Cal. 385. It need not allege the kind and value of property taken—73 N. C. 83; but describing it as “ten dollars in money of the United States currency,” was held too indefinite—47 Ala. 53. The indictment must allege that the property taken was the property of some person other than the defendant—21 Cal. 344. Ownership of the property is a part of the description of the offense—21 Cal. 344. It must state correctly the ownership of the property taken, as well as the name of him from whom it was taken—21 Cal. 344; 30 Tex. 214. Though an indictment fails to aver the character of the possession of the person from whom it was taken, it is not invalid—28 Cal. 490. An indictment against an accessory must contain all the averments necessary against the principal, and that the crime of the principal was committed before it was found and presented—50 Cal. 416; 31 id. 567. The owner of the property is not guilty of robbery in taking it from the person of the possessor, though he may be guilty of another offense—21 Cal. 345. See *ante*, §§ 211–213.

960. No indictment or information is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits. [In effect April 9th, 1880.]

Validity of indictment.—No indictment shall be deemed insufficient by reason of any defect which does not tend to prejudice the defendant—9 Cal. 55; 28 id. 211; 37 id. 281; 43 id. 446. Verbal or grammatical inaccuracies, which do not affect the sense, are not fatal—3 Ala. 120; 2 Dev. & B. 400; 15 Gray, 408; 3 Gratt. 650; 10 id. 708; 3 Heist.

376; 6 Ind. 333; 20 Iowa, 583; 8 Ired. 195; 19 Mo. 674; 55 Miss. 403; 23 N. Y. 317; 72 Id. 372; 55 N. C. 201; 80 Id. 384; 63 Id. 234; 7 Pa. St. 439; 6 Tex. Ct. App. 274; 9 W. Va. 641; 8 S. C. 237; see 15 Pa. St. 95. So as to mere misspelling—6 Ind. 333; 4 Wis. 400; it is no ground for arresting judgment—1 Dev. 263; 3 McCord, 190; 16 La. An. 183; 11 Rich. 356. The omission of formal words is not fatal—21 Mo. 481; 14 Vt. 353. So, erasures and interlineations do not vitiate—15 Gray, 194; 16 Id. 16; 12 Ind. 670; 44 N. H. 383; 14 Ohio, 461; 7 Car. & P. 319.

Sufficiency, how tested.—The sufficiency of an indictment is to be determined by the rules prescribed by this Code, and if an indictment, upon a fair reading, will stand this test, it is sufficient, though not good at common law—39 Cal. 210; 37 Id. 280; 27 Id. 510; 17 Id. 166; 9 Id. 55; 5 Id. 355. Mere formal defects, by which no substantial rights of defendant are prejudiced, will not justify an arrest of judgment—37 Cal. 231; as in case of matters of description—43 Id. 446; 28 Id. 211. Numbers and dates given in figures and abbreviations, instead of being written out—3 Vt. 481; 2 Ashm. 90; or, the omission of a formal word—14 Vt. 353; 21 Mo. 481; 2 Dev. 452; 19 Mo. 674; so, of erasures and interlineations, where the indictment is otherwise legible—15 Gray, 94; 14 Id. 376; 11 Id. 4; 12 Ind. 670; 14 Ohio, 461; 7 Car. & P. 319.

961. Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in an indictment or information. [In effect April 9th, 1880.]

See 92 U. S. 544; 56 Ind. 107; 110 Mass. 181; 3 Cranch C. C. 618.

962. In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, it is not necessary to state the facts constituting jurisdiction; but the judgment or determination may be stated as given or made, or the proceedings had. The facts constituting jurisdiction, however, must be established on the trial.

963. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof.

Private statutes.—An indictment on a private statute must set out the statute in full—7 Conn. 92; 1 Dev. & B. 115; 1 Sid. 356. This section changes the common-law rule—see 2 Hale P. C. 172; 2 Hawks, ch. 25, § 103; Bac. Abridg. "Indictment," p. 2.

964. An indictment or information for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter on which the indictment or information is founded; but it is sufficient to state generally that the same was published concerning him, and the fact that it was

so published must be established on the trial. [In effect April 9th, 1880.]

Libel.—The document should be set out in words and figures—7 Humph. 63; 1 Cush. 46; 3 Halst. 333; 2 Hawks, 248; 65 Ind. 86; 1 Mass. 54; id. 62; id. 66; 2 South, 749; 7 Serg. & R. 469; 10 id. 173; Wright, 73; 1 Leach, 77; id. 145. It must be set out accurately—1 Cush. 66; 7 Humph. 63; 2 McCord, 248; 10 Serg. & R. 173; see 10 Cush. 402; but the whole of it need not be set out—32 Me. 530. The date at the end of a libel need not be set forth—2 Gray, 289. Professing to set it out according to its substance is not sufficient—6 Rich. 387; 1 Cush. 46; 10 Serg. & R. 173; 7 Humph. 63. Where it was set out “according to the tenor and effect following, that is to say,” it is insufficient—7 Humph. 63; 6 Rich. 387; but describing the libel as a letter, circular, or pamphlet is not objectionable, being only a mode of publication—32 Me. 530. Where the omission of a letter does not alter the meaning of a word, the variance is immaterial—Thach. C. C. 29. Where parts are selected and set forth, preceded by the words “in these words,” or “as follows,” or “in the words and figures following,” or “to the tenor following,” a variance will be fatal—86 Ill. 147; 34 Me. 383; 1 Cush. 46; 2 Ohio St. 91. See *ante*, § 248.

The indictment must set forth matter which is *prima facie* libelous, or must charge that matters set out, although not a libel on its face, was designed to be so—6 Ired. 418. The charge need not be more specific than the libelous publication—3 Humph. 389. Charging that defendant sent the libel is a sufficient publication—32 Me. 530. The office of an innuendo is to point out and refer to matter previously expressed, to explain the meaning when obscure, and to indicate persons when reference to them is ambiguous—6 Ga. 276; 1 Rich. 179. An indictment which alleges that defendant published a libel “tending to blacken the honesty, virtue, integrity and reputation of the said A. B., and thereby expose him to public hatred, ridicule and contempt, in which said false, scandalous, and malicious libel there are defamatory and libelous matters of and concerning the character of the said A. B.,” sufficiently charges that the libel was in relation to A. B.—4 Ga. 14.

965. When an instrument which is the subject of an indictment or information for forgery has been destroyed or withheld by the act or the procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment or information, and established on the trial, the misdescription of the instrument is immaterial. [In effect April 9th, 1880.]

Lost instrument.—Where the document is lost or destroyed, or remains in defendant's hands, it is sufficient to aver special facts as an excuse for not setting it out—36 Cal. 245; 11 Cush. 142; giving the purport of the instrument as near as possible—50 Ala. 139; 27 Ill. 45; 55 Ind. 589; 2 Mason, 468; 34 Me. 223; 4 Leigh, 694; 69 N. C. 313; 1 Chip. D. 284; 16 Wend. 531; 2 Term. Rep. 200; 4 Car. & P. 254; id. 128. So, where the bond was with the defendant—2 Cowen, 522; see 1 Head, 139. A conviction will be sustained notwithstanding a variance—16 Wend. 53; see 1 Tyler, 147. So, where a libel is too indecent to be set forth, the non-setting forth will be excused—17 Mass. 336; 128 id. 46; 2 Serg. & R. 91; 1 Mann. (Mich.) 90; but the reason of the omission must be averred—1 Cush. 66. A non-description will be excused even when the loss is by prosecutor's negligence—16 Minn. 109. The production of the lost

instrument will be fatal, if there is a variance between the indictment and the proofs—33 Ind. 159. See *ante*, § 959, note.

966. In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court and before whom the oath alleged to be false was taken, and that the court, or the person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed. [In effect April 9th, 1880.]

Perjury.—An indictment charging the offense in the words of the statute is sufficient—6 Cal. 487. See *ante*, § 953. An indictment charging that accused did willfully, corruptly, and falsely swear, without alleging “feloniously,” is sufficient—6 Cal. 487. That accused (describing the proceeding) did willfully, corruptly, and falsely swear, etc., leaving out “feloniously,” is sufficient—7 Cal. 403; 6 id. 487. It should appear that the false evidence given was material to determination of the issue—61 Barb. 35; 4 Lans. 487; and it must show that the offense was committed in a judicial proceeding—30 Vt. 559; 37 id. 122; 25 Mich. 492; or in a course of justice—39 Me. 337; 6 Yerg. 531. It must state before what tribunal the oath was administered—1 Murph. 156; 8 Blackf. 225; and that the court or officer had authority to administer the oath—50 Me. 217. It is sufficient to aver that an issue was duly joined—1 Iowa, 160; 12 Mass. 274; 11 Ohio, 400; 5 Wend. 9. The indictment need not specify the particular mode in which the prisoner was sworn—3 Strob. 147; 9 N. H. 96; 36 N. Y. 431; 10 Rich. 165; 50 Barb. 531. But if the form of oath be alleged, it must be stated correctly—2 Hill (S. C.) 611; 7 Humph. 47. An averment of the substance of the oath is sufficient—5 Wend. 271; 6 N. Y. Supr. 206. It need not set out the whole oath, but only that part which is false—42 Mo. 119; 8 Wend. 636. It must allege that defendant willfully and corruptly swore that a certain thing is true, knowing it to be false, or denied it, knowing it to be true—1 Iowa, 503; 28 Tex. 626; 4 McLean, 113; 42 Tex. 238; see 20 Iowa, 582. Falsely, willfully, and corruptly, is sufficient, without the word “knowingly”—37 Vt. 122; or “feloniously”—6 Cal. 487; 7 id. 403. It must charge the falsity of the statement, and not leave it to be adduced by argument or intendment—28 Tex. 625. A general allegation that defendant swore falsely is not sufficient—59 Barb. 531; see 50 Me. 137. It should set out the substance and effect of the testimony which is alleged to be false—Busb. 402. See 59 Barb. 531. It must show that the false testimony was material—12 Mass. 274; 52 Ga. 242; 54 Mo. 182; see 12 Met. 225; 48 Mo. 93; 1 Dutch. 384; 3 Murph. 226; 14 Gray, 31; 32 Ill. 429; 42 id. 307; 1 Man. & E. 137. Where the materiality of the matter appears from the statements, an express allegation of materiality is unnecessary—1 Blackf. 49; 12 Met. 225; 8 Wend. 636; 3 Zab. 49; 3 Mich. 552; 26 Ind. 403; 29 id. 442; 47 Mo. 378. See *ante*, § 118.

967. In an indictment or information for the larceny or embezzlement of money, bank-notes, certificates of stock, or valuable securities, or for a conspiracy to cheat or defraud a person of any such property, it is sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, bank-notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof. [In effect April 9th, 1880.]

Larceny.—It is not necessary to state facts showing the commission of the offense in another county—40 Cal. 648. The venue may be laid in any county into which the stolen property is conveyed—*id.* If there is a repugnancy between the caption and the statement in the body of the indictment as to the venue, it is bad for repugnancy and uncertainty—18 Tex. 3-1. It must allege that the larceny was committed in the county where the indictment was found—47 Miss. 671; 8 Nev. 208; 3 Stewt. 123; 43 Ill. 397.

Description of property.—The goods must be described with certainty to a common intent—8 Barb. 637. It must describe the articles by the names they usually bear, and specify the number and value of each species or particular kind—11 Humph. 39; 8 Ired. 226.

An indictment for larceny of a piece of paper may simply state its value, without further description—100 Mass. 206; see 103 *id.* 436; see as to promissory notes—4 Serg. & R. 194; 41 Conn. 590. So, for "stealing a parcel of oats" is sufficient—1 Dev. 137. Charging the stealing of "one hundred and thirty dollars" without a specific description of the money, is bad—29 Ark. 68; S. C. 2 Am. Cr. R. 340. The species of money stolen must be alleged—12 Cox C. C. 257; S. C. 1 Green C. R. 1.

Money.—Sundry gold coins current as money in this commonwealth, of the aggregate value of twenty-nine dollars, but a more particular description of which the jurors cannot give, as they have no means of knowledge, is sufficient—11 Cush. 142; or sundry bank-bills of some banks, respectively to said jurors unknown, of the amount and value in all of thirty-eight dollars—10 Gray, 470. An information which describes the property as one hundred and thirty-five dollars, "of the property, goods, and chattels of A.," and without any allegation of its value, is fatally defective—26 Mich. 298; S. C. 1 Green C. R. 349. Stolen coin should be described as so many pieces of current gold or silver coin, specifying the species unless unknown to the grand jury, in which case they may so state—36 Cal. 245; 14 *id.* 101; 11 Humph. 39. That the grand jury have no knowledge or means of knowledge of the particular description of the coin or bank-bills, is no ground for arrest of judgment—11 Cush. 142; see 12 Allen, 451. It must state that they were of the current coin of the United States—37 Tex. 359.

An indictment not showing the species of cattle taken is sufficient—5 Cal. 355. Describing an animal in the alternative as to his color, etc., is not a fatal error—15 Cal. 408. Where the indictment describes the animal as a bay, proof that he was a bay or sorrel is sufficient to support the verdict—3 Heisk. 452; S. C. 1 Green C. R. 353. In an indictment for stealing bees and oysters, it need not aver that they were reclaimed—23 Gratt. 941; S. C. 2 Green C. R. 654; 2 Dutch. 111. In an indictment for stealing gold-bearing quartz, it must be alleged that it had been severed from the ledge before the alleged taking—35 Cal. 671. The allegation in an indictment for larceny, that defendant stole

"six hundred and ten pounds of silver-bearing ore" sufficiently shows that the property was personal property—8 Nev. 262; S. C. 2 Green C. R. 335. In an indictment for stealing from a building, if it does not properly describe the building, it may still be good for simple larceny—14 Gray, 392; 32 Me. 583. Where chattels are stolen in one county and carried into another, an indictment lies in the latter, should the larceny have been committed in that county—47 Miss. 671; S. C. 1 Green C. R. 341; 8 Nev. 208; S. C. 1 Green C. R. 343. An indictment for stealing one article (naming it) of the value of (stating it) is good—3 Gill & J. 310—1 Mo. 532; 39 Tex. 46; but of one certain trunk containing various articles is bad, for uncertainty—Id. 388; see 5 Jones (N. C.) 318.

Ownership.—An allegation of ownership is essential, unless the offense is sufficiently described—41 Cal. 236; or where the ownership is considered immaterial—19 Cal. 598. The ownership must be averred and if not known, it must be so stated—25 Ind. 234; 12 Pick. 173; 14 Mass. 217; 7 Bush, 641; 53 Me. 124. So, an indictment for altering the brand on a horse with intent to steal it, or that the owner is unknown—19 Cal. 425. The word chattel denotes property and ownership—18 Johns. 90; 2 Va. Cas. 154; 1 Doug. (Mich.) 42; 55 Me. 200. Ownership of articles furnished to a child may be alleged in either the parent or the child—2 Strob. 229; 4 Har. (Del.) 570. Ownership of property held by a married woman must be alleged in her husband—9 Cush. 283; 7 Gray, 337; 13 La. An. 265; 33 Tex. 789; so, of the separate property of the wife in the possession of her husband—17 Ala. 415. It is necessary to set forth the name of the owner of the goods if known—42 Miss. 642; 7 Ired. 210; 47 N. H. 416; but a mere variance in the christian name is immaterial—5 How. (Miss.) 33; so, the initials of the christian name are sufficient—31 Tex. 560; and a mere variance in the initials is immaterial—32 Tex. 124.

An indictment for stealing a letter must state it to be the property of some other person than the prisoner—1 Curt. 364. It may describe bank-notes as the property of the person forwarding them—3 McLean, 405. An indictment which states that A. B. & Co. are the owners of the property is sufficient—19 Cal. 598; but see 36 Id. 247.

Special ownership.—Where there is a special ownership, the indictment may lay the ownership in either the special or general owner—55 N. H. 152; 30 Iowa, 203; 10 Gray, 469; 1 Head, 454. So, where goods were bought for the poor, they may be alleged as the property of the county—37 N. Y. 117. It may be alleged as the property of the guardian—22 Ga. 499; or in the manufacture of goods of his employer—32 N. H. 301; or of a washerwoman—3 McLean, 405; or of a constable—10 Wend. 166; or of a hirer—13 Ala. 153; or of a landlord—32 N. H. 301; or of a coach-maker hired to repair—3 McLean, 405; or in a driver—Id.; or in one in lawful possession—1 Bail. 310; see 1 Parker, 329; 6 Humph. 330.

Ownership in different persons.—The spoils of a single larcenous act may all be included in one count—62 Me. 284; even though the articles are the property of different persons—42 Ind. 335; 29 Me. 329; 7 Mo. 55; 37 Id. 373; 23 Ohio St. 339; or there may be as many different indictments as there are owners—104 Mass. 552; 2 McMull. 382; 9 Nev. 321. Counts for horse-stealing and for stealing other property may be joined—18 Ohio, 221; 50 N. H. 150; 40 Vt. 555.

Joint-ownership.—The property of joint-owners must be alleged in the names of all the joint-owners, but if they be a corporation, it may be in the name of such corporation—36 Cal. 245. It must be laid in the partner who has the legal interest in them—1 Wheel. C. C. 369. An indictment which in one count alleges the goods to be the property of certain persons, and in other counts states the owners to be other persons, does not charge different offenses—17 Cal. 354. Where prop-

erty stolen belongs to a body of persons, it ought not to be laid as the property of the body unless incorporated, but should be alleged as belonging to the individuals—63 Ill. 451; 2 Green Cr. R. 562.

Value.—Where the nature of the punishment depends on the value of the things stolen, the allegation of value is material—46 N. H. 186; 42 Ala. 531; 1 Mass. 245; 13 Fla. 671; 40 Ga. 229; 5 Cush. 365; see 6 Parker Cr. R. 256. The value of each article and the name of each owner must be separately and specifically alleged—44 N. H. 624; 9 Met. 134; *contra*, 5 Blackf. 224; 8 id. 498; 101 Mass. 207; 44 Ala. 396; 3 McLean, 405; 1 Port. 118; 8 Gray, 492; 10 id. 470; 46 Ala. 85.

An indictment charging with the larceny of two hundred and fifty sheep, of the value of one thousand dollars, is not sufficient, because the value of each sheep is not separately stated—34 Cal. 591. The allegation of value in "dollars," without adding "lawful money of the United States," is sufficient—9 Cal. 234. The allegation of value is sufficient if it is as certain as the language in the statute—9 Cal. 236. Under the statute of 1868, it is not necessary to state the value of a horse, mare, etc.—39 Cal. 405. An indictment for entering a house, with intent to steal, need not aver the value of, nor give more than a general description of the property the defendant intended to steal—31 Cal. 451.

Guilty knowledge and intent.—It must allege that the property was taken with intent to deprive the owner of it—26 Tex. 106; 41 id. 231; and that it was taken without the consent of the owner—39 id. 393; but this is unnecessary where he had possession only to keep the property—35 id. 724; see 32 id. 155. An averment that defendant broke into a house with intent to steal or commit a felony, charges grand larceny—48 Cal. 684; S. C. 2 Green C. R. 623; but see 46 Ala. 717.

Joinder.—Where several were joined in a charge of attempt to steal, all may be convicted though only one did the act—105 Mass. 502; and it is immaterial whether they were previously acquainted, or were confederated for a felonious purpose—43 Ill. 397. The thief and the receiver cannot be jointly indicted—34 Cal. 181; *contra*, 7 Gray, 43; 12 Allen, 451.

Distinct offenses.—Distinct larcenies may be presented in different counts—104 Mass. 552. So, as to larceny, and receiving—45 Me. 608; 8 Humph. 69; 4 Ind. 246; 4 La. An. 434; id. 435; 10 Cush. 530. So, as to breaking, and entering, and larceny—20 Pick. 356; 22 id. 1; 11 N. H. 38; see 18 Minn. 518. As to rule in California, see *ante*, § 954. So, as to embezzlement, and stealing—9 Met. 138.

Charging in different ways.—An indictment charging with "stealing, taking, and leading or driving away" is not bad, as charging offense in the disjunctive—15 Cal. 408. See *ante*.

Second offense.—The indictment must state facts to show that he had, prior to last offense, been convicted of a previous offense—7 N. Y. 50; see 3 Parker Cr. R. 330; 1 Hill, 261; 1 Parker Cr. R. 645; 1 Rob. (Va.) 754; 5 Hill, 427.

Material averments.—The word "steal" is not necessary—1 How. (Miss.) 262; 2 Ind. 91; and the word "steal" for steal is not cause for arrest of judgment—4 Blackf. 457. Where the indictment charged "larceny," it was held that the word "larceny" could not be substituted, and the indictment charges no offense—6 Pac. C. L. J. 322. "Carry," omitting the word "away," is insufficient—7 Gray, 43. Omitting the words "lawful money of the United States" is not a ground for demurrer—9 Cal. 234. The words "lead or drive away" are not necessary in an indictment for stealing an animal—46 Cal. 302.

Charging attempt.—A charge of an attempt must state facts showing the manner in which the attempt was made—3 Nev. 238; as charging that defendant took the impression of a key, and prepared a false

key to unlock the door, and break and enter to steal—26 Ga. 493. So, as to an attempt to pick the pocket of a person—105 Mass. 169.

Sufficiency of indictment.—That defendant (naming date and place) "did unlawfully and feloniously take, steal, and carry away" one horse of the personal goods of (naming the owner) is sufficient—6 Pac. C. L. J. 569. It is sufficient to charge that defendant did steal, take, and carry away, without "lead or drive away"—46 Cal. 302. That defendant "did feloniously, wilfully, and unlawfully steal, take, and carry, lead, and drive away," is a sufficient statement of the intent—27 Cal. 500. "Stealing, taking, leading, or driving away," is not defective as charging the offense in the disjunctive—15 Cal. 408. See § 958.

Larceny by bailee.—Indictment must state with directness and certainty facts and circumstances necessary to constitute a complete offense, including the bailment—19 Cal. 601. That the property was of the value of so many dollars, without saying "coin of the United States," is insufficient—19 Cal. 601; 15 id. 512; overruling 8 id. 42. The defendant could not be convicted without proving intention to steal the horse at the time of taking it—18 Cal. 337. Indictments against bailees should distinctly set forth the character of the bailment, the mode of conversion, the description of the property, and its value—8 Cal. 42; 9 id. 313; 19 id. 600.

Embezzlement.—An indictment for embezzlement must aver the relation of defendant to the injured party, and that the property came into his possession, or under his care, by virtue of his employment—5 Denio, 76; see 4 Mich. 665; but it need not charge that he was the clerk or servant of the owner of the goods—1 Parker Cr. R. 202. It must describe the property—6 Gray, 15; with the same particularity as is required in larceny—40 Cal. 277; 5 Allen, 502; but it will be sufficient without proving the denominations of the coins—32 Tex. 763. Describing the property "as certain books, letters, files, knives, bank-shares, plates, and sealing-wax, to about the value of forty dollars," is sufficient—30 Ala. 32. It may allege the embezzlement of different articles—4 Parker Cr. R. 662. Charging the embezzlement of "a lot of lumber," "a certain lot of furniture," and "certain tools," is bad for uncertainty—10 La. An. 229. An indictment against an officer for embezzlement of money paid to him as fines, must state the character and kind of fines, and charge a fraudulent intent—36 Tex. 647. If against a county treasurer for embezzling funds, it need not state the kind of funds—13 Kan. 274; id. 299. For embezzling a letter containing a bank-note, it need not state what office the defendant held, nor set out the note—Crabbe, 584. Charging with embezzlement of a certain amount on one date, and with the embezzlement of another amount on another date, was held bad as charging two offenses—23 Cal. 577; but alleging that defendant received as tax collector a certain sum for licenses due the State, and a certain other sum for licenses due the county, does not charge two distinct offenses—31 id. 416. See *ante*, § 959, note.

Previous conviction.—The indictment must specifically aver the prior conviction—2 Met. 413; 8 Gray, 382; 78 Pa. St. 490; 47 Md. 485; 9 Gratt. 938; 27 Vt. 523; and when the court was one of general jurisdiction, an allegation of that fact is enough—3 Parker Cr. R. 330; but when of special and limited jurisdiction, it should aver facts to show jurisdiction both of person and subject-matter—6 N. Y. 50. The averment of conviction without the averment of sentence is sufficient—1 Hill, 261; *contra*, 14 Serg. & R. 69. It must appear that the prior conviction was legal, and in a court having jurisdiction—3 Cowen, 347—9 Gratt. 739; and a foreign conviction cannot be made the basis of the averment—1 Parker Cr. R. 345.

968. An indictment or information for exhibiting, publishing, passing, selling, or offering to sell, or having

in possession, with such intent, any lewd or obscene book, pamphlet, picture, print, card, paper, or writing, need not set forth any portion of the language used or figures shown upon such book, pamphlet, picture, print, card, paper, or writing; but it is sufficient to state generally the fact of the lewdness or obscenity thereof. [In effect April 9th, 1880.]

Obscene publications.—The indictment need not so fully describe them as to spread them out on the records—1 Mann. (Mich.) 90; 17 Mass. 336; but if set out, it must be in the very words of which it is composed—1 Cush. 66; but when too obscene, a description may be substituted, and a reason for the omission be stated—Id. It is not necessary to allege that the exhibition of an obscene picture was in a public place, if exhibited to sundry persons for money—2 Serg. & R. 91.

969. Section nine hundred and sixty-nine of said Code is hereby repealed. [In effect April 9th, 1880.]

970. Upon an indictment or information against several defendants, any one or more may be convicted or acquitted. [In effect April 9th, 1880.]

Severalty.—Convictions of codefendants are several—32 Miss. 406. The charge against them is several as well as joint—2 Ired. 402; 49 Vt. 437; and a joint verdict is a distinct verdict against each—29 Pa. St. 423. So, one may be found guilty and the others acquitted—3 Cush. 523. When two are charged with an offense, it is not a variance that the proof goes only to one—21 Pick. 523; 105 Mass. 586; 107 Id. 208. As to adultery, see 7 Jones (N. C.) 159; 14 Gray, 57; and see 14 Ohio, 386. When several persons are jointly indicted and convicted, they should be sentenced severally—16 Ark. 37; 14 B. Mon. 386; 3 Wis. 735, and be severally fined—10 Mo. 440; 21 Id. 504; 61 Id. 302.

971. The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal. [In effect April 9th, 1880.]

Accessories before the fact.—An accessory before the fact may be indicted, tried, and punished as principal—48 Cal. 22; 40 Id. 141; nevertheless, the indictment must specify that he aided and abetted the

crime, and must state in what particular manner he did so—40 Cal. 141; 39 Id. 75; see 32 Id. 164. Charging in one count the defendant as principal, and in another count as accessory, does not charge two offenses, nor are the two counts inconsistent—48 Cal. 189; 45 Id. 555; see 40 Id. 129; 39 Id. 75; 32 Id. 164; see 6 Id. 23.

Accessories, who are.—An accessory before the fact is one who, being absent at the time the crime is committed—1 Leach, 515; yet procures, counsels, encourages, incites, or commands another to commit the crime—5 Cal. 134; 27 Id. 340; 1 Brev. 357; 8 Cowen, 137; 4 Cranch C. C. 469; 1 Hayw. (N. C.) 4; 99 Mass. 433; 26 Mich. 112; 2 Ohio St. 241; 4 Parker Cr. R. 234; 10 Smedes & M. 192. He who procures a felony to be done is a felon—2 Bond, 311; 8 Dana, 23; 13 Ired. 114; 3 Mass. 254; 4 Id. 439; 12 Smedes & M. 58; 12 Wheat. 460; 4 Yerg. 143; 45 Ind. 468. So, as to procuring a murder to be done—33 Ind. 418; 13 Tex. 168. The distinction between principals and accessories as at common law has been abolished by statute—10 Cal. 68; 59 Ala. 106; and accessories before the fact are all principals—5 Cal. 134; 10 Id. 68; 12 Kan. 559; S. C. 1 Am. Cr. R. 567; 11 Ind. 62; 1 Bailey, 132; 54 Barb. 239. A detective entering into a conspiracy to commit a crime for the purpose of exploding it, is not an accessory before the fact—84 Pa. St. 187. So merely concealing a felonious design will not make a person an accessory—81 Ill. 333.

Instigation to crime.—A person inciting another in a tumultuous crowd to strike an officer, is guilty of the assault—99 Mass. 443; 27 Cal. 240; so procuring, counseling, or inciting a clerk or agent, renders the instigator liable—15 Ga. 346. So an instigator may be guilty of murder in instigating a manslaughter—Dears. & M. 288. At common law the instigator and perpetrator may be guilty in different degrees—31 N. Y. 229; 32 Miss. 405; while the instigator is responsible for incidental consequences of the crime he counsels, it is otherwise as to collateral crimes—26 Mich. 112; 5 W. Va. 532. The instigator need not be the originator of the criminal design; if he encourage the perpetrator by falsehood, or otherwise, he is guilty as accessory—10 Smedes & M. 192; Car. & M. 215. The advice, procurement, encouragement, etc., may be direct or indirect—6 Cox C. C. 333; by words, signs, or motions—40 Ill. 438; and it may be personally, or through the intervention of a third person—19 St. Tri. 804; 5 Car. & P. 535; and if the procurement is through an intervening agent, it is not necessary that the instigator should know the name of the perpetrator—1 Denison, 39; 6 Car. & P. 535; 1 Moody, 166; 19 How. St. Tri. 804; and no matter how long a time or how great a space intervenes between the advice or instigation and the consummation of the deed, if there is immediate causal connection between the instigation and the act, it is sufficient—111 Mass. 395; 3 Cox C. C. 288; 6 Id. 333.

Liability of accessories.—The offense of being accessory before the fact is committed in the county where the substantive accessorial acts are consummated—13 Bush, 142; 114 Mass. 307; in which county only can he be indicted—27 Cal. 340; 57 How. Pr. 342; 1 Parker Cr. R. 246. An accessory before the fact in one State, to a felony committed in another State, is guilty of the crime in the State where he became accessory, and is answerable there, while the principal is indictable in the latter State—17 Ark. 561. A person out of the State becoming an accessory before the fact to a felony committed within the State, cannot be prosecuted under the laws of the State—19 Ind. 421. At common law, one indicted as principal cannot be convicted on proof showing him to be an accessory before the fact, and *e converso*—40 Cal. 129; 41 Id. 429; 39 Id. 75; 28 Id. 404; 32 Id. 160; 12 Ala. 458; 15 Ga. 346; 52 Id. 287; 39 Miss. 613; 8 Neb. 80; 49 N. H. 39; 65 N. C. 572; 31 N. J. L. 65; 83 Ill. 479; 9 Cox C. C. 242; 7 Car. & P. 575; but in States where all are principals, he may be indicted and convicted as principal—40 Cal. 129; 41 Id. 429; 39 Id. 75; 28 Id. 404; 32 Id. 164; 6 Id. 23; 14 Bush, 232; 56 Ga. 92; 40 Iowa, 169; 4 Ill. 368; 47 Id. 323; 49

id. 410; 12 Kan. 550; 37 Pa. St. 108; 84 id. 187; 59 Mich. 106. An accessory not amenable to the law cannot be arraigned, unless his acts render him liable as principal—1 Wood. & M. 221. On separate trials, the conviction of the principal is only *prima facie* evidence of guilt on trial of the accessory, and may be collaterally disputed—3 Cliff. 221; 6 Ired. 236; 29 Me. 84; 33 N. H. 216; 10 Pick. 477; 1 Mass. 54; 13 Wend. 592; 10 Smedes & M. 192; 1 Moody C. C. 347. Aiders and abettors may be convicted, although the principal has been acquitted—28 Ga. 216; 29 Mo. 32; 10 Cal. 68; 1 Leach, 360; 2 Shaw, 370; Russ. & R. C. C. 314; Saik. 334.

972. An accessory to the commission of a felony may be prosecuted, tried, and punished, though the principal may be neither prosecuted nor tried, and though the principal may have been acquitted. [In effect April 9th, 1880.]

Both the principal and accessory may be indicted together or separately, without reference to the previous conviction or acquittal of the other—10 Cal. 68; 20 id. 439; and so with reference to aiders and abettors—id. Accessories before the fact may be tried separately—40 Cal. 129; 56 Ga. 92; 4 Ill. 368; 49 id. 410; 14 Ind. 52; 46 Iowa, 265; 12 Kan. 550; 29 Me. 84; 126 Mass. 242; 18 Ohio St. 496; 19 Ohio, 131; 25 Pa. St. 221; 12 Wis. 532; Law R. 1 C. C. 77; Bell's C. C. 243. They may be indicted, although the prime actor be dead or escaped—2 Brev. 338; Meigs, 106; and see 24 Mo. 475.

TITLE VI.

Of Pleadings and Proceedings after Indictment
and before the Commencement of the Trial.

CHAP. I. OF THE ARRAIGNMENT OF THE DEFENDANT,
§§ 976-90.

II. SETTING ASIDE THE INDICTMENT, §§ 995-9.

III. DEMURRER, §§ 1002-12.

IV. PLEA, §§ 1016-23.

V. TRANSMISSION OF CERTAIN INDICTMENTS FROM
THE COUNTY COURT TO THE DISTRICT
COURT OR MUNICIPAL CRIMINAL COURT OF
SAN FRANCISCO, §§ 1028-30.

VI. REMOVAL OF THE ACTION BEFORE TRIAL, §§
1033-8.

VII. THE MODE OF TRIAL, §§ 1041-3.

VIII. FORMATION OF THE TRIAL JURY AND THE CAL-
ENDAR OF ISSUES FOR TRIAL, §§ 1046-9.

IX. POSTPONEMENT OF THE TRIAL, § 1052.

CHAPTER I.

OF THE ARRAIGNMENT OF THE DEFENDANT.

- § 976. Defendant must be arraigned in the court where the indictment is filed or transferred.
- § 977. Defendant, when to be present at arraignment.
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- § 979. If discharged on bail, bench-warrant to issue.
- § 980. Bench-warrant, by whom and how issued.
- § 981. Form of bench-warrant.
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- § 985. Ordering defendant into custody or increasing bail when indictment is for felony.
- § 986. Defendant, if present when order made, to be committed; if not, bench-warrant to issue.
- § 987. Right to counsel on arraignment.
- § 988. Arraignment, how made.
- § 989. Proceedings on arraignment, when defendant is not indicted by his true name.
- § 990. Time allowed, and how defendant may answer on arraignment.

976. When the indictment or information is filed, the defendant must be arraigned thereon before the Court in which it is filed, unless the cause is transferred to some other county for trial. [In effect April 9th, 1880.]

Arraignment necessary.—A verdict in a case where there has been neither arraignment nor plea is a nullity—28 Cal. 330; 3 Wis. 830. The failure of this duty is fatal—52 Cal. 480; 54 Ind. 159; 31 Mich. 471; Pinn. (Wis.) 337; 53 Mo. 234; 1 Tex. Ct. App. 408; *contra*, 12 Kan. 58; but it need not be repeated after a mistrial—53 Ga. 35. If, on appeal, the record fails to show that defendant was arraigned and pleaded, the court will assume that there was no arraignment or plea—53 Cal. 480. The defendant does not waive an arraignment and plea by submitting to a trial, introducing witnesses, and allowing the case to be argued on his behalf—28 Cal. 330; 3 Wis. 830; see 8 Smedes & M. 38. When the case in which defendant is arraigned is removed to another court, no fresh arraignment is required—39 Md. 355.

977. If the indictment or information be for a felony, the defendant must be personally present; but if for a misdemeanor, he may appear upon the arraignment by counsel. [In effect April 9th, 1880.]

Personal presence.—The defendant is arraigned in person—55 Cal. 298; unless in case of misdemeanor—42 Cal. 168. In case of breaking jail and escaping, he waives his right to have counsel appear for him in a case of misdemeanor—55 Cal. 298; 42 Cal. 168; 97 Mass. 543, cited 23 Cal. 160. See Const. Cal. art. 1, § 13.

978. When his personal appearance is necessary, if he is in custody, the court may direct, and the officer in whose custody he is must bring him before it to be arraigned.

Rights of defendants.—The defendant has a right to appear and remain without chains and shackles—42 Cal. 168.

979. If the defendant has been discharged on bail, or has deposited money instead thereof, and do not appear to be arraigned when his personal attendance is necessary, the court, in addition to the forfeiture of the undertaking of bail or of the money deposited, may direct the clerk to issue a bench-warrant for his arrest.

See 55 Cal. 298.

980. The clerk, on the application of the district attorney, may, at any time after the order, whether the court is sitting or not, issue a bench-warrant to one or more counties.

See 55 Cal. 298.

981. The bench-warrant upon the indictment or information must, if the offense is a felony, be substantially in the following form: County of ——. The people of the State of California to any sheriff, constable, marshal, or policeman in this State: An indictment having been found (or information filed) on the — day of —, A. D. eighteen —, in the Superior Court of the county of —, charging C. D. with the crime of — (designating it generally); you are, therefore, commanded forthwith to arrest the above named C. D., and bring him before that court, (or if the indictment and information has been sent to another court, then before that court, naming it (to answer said indictment (or information); or if the court be not in session, that you deliver him into the custody of the sheriff of the county of —.

Given under my hand, with the seal of said court affixed, this — day of —, A. D. —.

By order of said Court.

[SEAL.]

E. F., Clerk.

[In effect April 9th, 1880.]

Cited—55 Cal. 298; 54 Cal. 102. A general description of the offense is sufficient—9 Ga. 75.

982. The defendant, when arrested under a warrant for an offense not bailable, must be held in custody by the sheriff of the county in which the indictment is found or information filed, unless admitted to bail after an examination upon a writ of habeas corpus; but if the offense is bailable, there must be added to the body of the bench-warrant a direction to the following effect: "Or, if he require it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer to the indictment, or information"; and the court, upon directing it to issue, must fix the amount of bail, and an indorsement must be made thereon and signed by the clerk, to the following effect: "The defendant is to be admitted to bail in the sum of — dollars." [In effect April 9th, 1880.]

Cited—54 Cal. 103; 55 Cal. 298.

983. The bench-warrant may be served in any county, in the same manner as a warrant of arrest, except that when served in another county it need not be indorsed by the magistrate of that county.

Cited—55 Cal. 298. See ARREST, *ante*, §§ 841-851.

984. If the defendant is brought before a magistrate of another county for the purpose of giving bail, the magistrate must proceed in respect thereto in the same manner as if the defendant had been brought before him upon a warrant of arrest, and the same proceedings must be had thereon.

Cited—55 Cal. 298.

985. When the information or indictment is for a felony, and the defendant, before the filing thereof, has

given bail for his appearance to answer the charge, the court to which the indictment or information is presented, or in which it is pending, may order the defendant to be committed to actual custody, unless he gives bail in an increased amount, to be specified in the order. [In effect April 9th, 1880.]

986. If the defendant is present when the order is made, he must be forthwith committed. If he is not present, a bench-warrant must be issued and proceeded upon in the manner provided in this chapter.

987. If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him.

Cited—55 Cal. 298. See 15 Cal. 331; Const. of Cal. art. 1, § 13.

988. The arraignment must be made by the court, or by the clerk or district attorney under its direction, and consists in reading the indictment or information to the defendant and delivering to him a copy thereof, and of the indorsements thereon, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the indictment or information. [In effect April 9th, 1880.]

Manner of arraignment.—Where the indictment was not read to the defendant, a copy of it with the indorsements was neither delivered nor tendered to him, nor was he either then or thereafter asked whether he would plead guilty or not guilty, there was no arraignment. 23 Cal. 330. If the defendant when arraigned asks for and obtains leave to plead, he waives any defect in the statutory details of the arraignment, such as the failure to give him a copy of the indictment. 23 Cal. 228. See 28 Cal. 331. The defendant being brought into court, the first step is to call upon him by name to answer the matter charged against him. See 1 Burr. 643; 2 Hale P. C. 119; see *ante*, §§ 858-859-860, and notes; and *post*, § 990, and notes.

989. When the defendant is arraigned, he must be informed that if the name by which he is prosecuted is not his true name, he must then declare his true name, or be proceeded against by the name in the indictment or information. If he gives no other name, the court may

proceed accordingly; but if he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the information or indictment may be had against him by that name, referring also to the name by which he was first charged therein. [In effect April 9th, 1880.]

Name unknown.—If, when arraigned, the defendant fails to give his true name on request, he cannot afterward complain if he is tried by the name specified in the indictment—3 Nev. 251. If he gives his true name, it must be substituted, and the subsequent proceedings be had in the true name—32 Cal. 64; which must be entered on the minutes—6 Cal. 212.

See *ante*, § 988. and note.

990. If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one day, to answer the indictment or information. He may, in answer to the arraignment, move to set aside, demur, or plead to the indictment or information. [In effect April 9th, 1880.]

CHAPTER II.

SETTING ASIDE THE INDICTMENT.

- § 995. Indictment, when set aside on motion.
- § 996. Defendant waives objections, unless he makes the motion.
- § 997. Motion, when heard. If denied or granted, what proceedings are to be had.
- § 998. Effect of order for submission.
- § 999. Order no bar to another prosecution.

995. The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases: If it be an indictment—

1. Where it is not found, indorsed, and presented as prescribed in this Code.
2. When the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, are not inserted at the foot of the indictment, or indorsed thereon.
3. When a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in section nine hundred and twenty-five.
4. When the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror.

If it be on information—

1. That before the filing thereof the defendant had not been legally committed by a magistrate.
2. That it was not subscribed by the district attorney of the county. [In effect April 26th, 1880.]

Motion.—Making out and filing a written application is not sufficient to constitute a motion. The attention of the court must be called to it, and the court be moved to grant it—41 Cal. 650. Where the evidence

is conflicting, the court may refuse to set aside the indictment—54 Cal. 399. An order setting aside an indictment is not an interlocutory order, but a final order and appealable—31 Cal. 564.

Subd. 1.—See 54 Cal. 38; 48 Id. 550; 31 Id. 368. This subdivision refers to provisions of the Code prescribing the mode of finding, indorsing, and presenting the indictment—54 Cal. 38; 46 Id. 148; see 4 Id. 225; 54 Id. 400. See *ante*, §§ 941-945.

Subd. 2. See 6 Cal. 96; 21 Id. 368; 22 Id. 348; 54 Id. 400. See *ante*, § 943.

Subd. 3. See 54 Cal. 400; *ante*, §§ 906, 919, 920, 925.

Subd. 4. Challenge to grand jury.—If the defendant was held to answer before the grand jury met, and was informed that he could interpose a challenge to the panel or to an individual grand juror, and he declines to do so, he waives his right to do so after he is indicted—49 Cal. 650; see 54 Cal. 38; 23 Id. 631; see 39 Id. 326; but if he was not held to answer at the time, he may interpose a challenge to the panel or an individual juror on his arraignment—14 Cal. 571. A person accused before indictment may challenge any one returned on the grand jury—1 Black, 317; 2 Id. 475; 2 Browne, (Pa.) 237; 17 Ohio St. 583; but it is too late after indictment is found and accepted—21 Cal. 372; 2 Port. 100; 17 Smedes & M. 68; 5 Eng. 78; Id. 71; 3 Wend. 314. So, an objection to the formation of the grand jury cannot be presented on motion to set aside the indictment—54 Cal. 38; 46 Id. 148; as such motion on arraignment on such a ground is, in effect, a challenge to the panel—46 Cal. 148; but if the indictment was found by a special grand jury, it can be set aside on the first and third grounds of this section—54 Cal. 38; see 45 Id. 29. So, an indictment found by a jury summoned as a petit jury and impaneled as a grand jury, is illegal—45 Cal. 29. See *ante*; § 894.

996. If the motion to set aside the indictment or information is not made, the defendant is precluded from afterward taking the objections mentioned in the last section. [In effect April 9th, 1880.]

Waiver of objections.—The motion to set aside the indictment must be made before plea, or it will be deemed waived—34 Cal. 308. If not made before plea or demurrer, defendant cannot afterward take the objections allowed in § 995—6 Cal. 96; 21 Id. 368; 26 Id. 115; 28 Id. 272; 34 Id. 308; 39 Id. 377; 48 Id. 550.

997. The motion must be heard at the time it is made, unless, for cause, the court postpones the hearing to another time. If the motion is denied, the defendant must immediately answer the indictment or information, either by demurring or pleading thereto. If the motion is granted, the court must order that the defendant, if in custody, be discharged therefrom; or, if admitted to bail, that his bail be exonerated; or, if he has deposited money instead of bail, that the same be refunded to him, unless it directs that the case be resubmitted to the same or another grand jury, or that an information be filed by the district attor-

ney; *provided*, that after such order of resubmission the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases, if, before indictment or information filed, he has not been examined and committed by a magistrate. [In effect April 9th, 1880.]

998. If the court directs the case to be resubmitted, or an information to be filed, the defendant, if already in custody, must so remain, unless he is admitted to bail; or, if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment or information; and, unless a new indictment is found, or information filed before the next grand jury of the county is discharged, the court must, on the discharge of such grand jury, make the order prescribed by the preceding section. [In effect April 9th, 1880.]

999. An order to set aside an indictment or information, as provided in this chapter, is no bar to a future prosecution for the same offense. [In effect April 9th, 1880.]

CHAPTER III.

DEMURRER.

- § 1002. Pleading on part of defendant.
- § 1003. Demurrer or plea, when put in.
- § 1004. Grounds of demurrer.
- § 1005. Demurrer, how put in, and its form
- § 1006. When heard.
- § 1007. Judgment on demurrer.
- § 1008. If allowed, bar to another prosecution; when.
- § 1009. If resubmission not ordered, defendant discharged, etc.
- § 1010. Proceedings, if submission ordered.
- § 1011. Proceedings, if demurrer is disallowed.
- § 1012. Objections, forming ground of demurrer, when taken.

1002. The only pleading on the part of the defendant is either a demurrer or a plea.

1003. Both the demurrer and plea must be put in, in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose.

Objections, when taken.—Objections to the insufficiency of the indictment must be taken at the trial—4 Cal. 226; id. 240; and a failure to demur at the proper time is a waiver of the objection—35 id. 115; 49 id. 550; 49 id. 390; see §§ 976-90. All defects purely technical must be taken advantage of before verdict—6 Md. 410.

Effect of demurrer.—The offense is admitted by the demurrer—44 Vt. 629; but it does not admit the legal effect of the facts therein pleaded—84 Pa. St. 18. It puts in issue the legality of the whole proceeding—84 Pa. St. 65.

1004. The defendant may demur to the indictment or information, when it appears upon the face thereof, either—

1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the county; or, if an information, that the court has no jurisdiction of the offense charged therein.

2. That it does not substantially conform to the require-

ment of sections nine hundred and fifty, nine hundred and fifty-one, and nine hundred and fifty-two.

3. That more than one offense is charged.

4. That the facts stated do not constitute a public offense.

5. That it contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution. [In effect April 9th, 1880.]

Grounds of demurrer.—Objections to the indictment must be taken prior to plea, or they cannot be considered on arrest of judgment, except under the fourth subdivision of this section, for if no offense is charged, no conviction can be had—7 Cal. 129; id. 289; 10 id. 37; 27 id. 394; 28 id. 285; 39 id. 370. An indictment defective in substance and form may be demurred to—10 Gratt. 708; but it will not lie for defect in indorsing and filing the indictment—28 Ark. 410.

Subd. 1. If it appears from the caption that the court had no jurisdiction, the indictment will be adjudged invalid—1 Term Rep. 316; 1 Leach, 425. Where the record does not show objections to the jurisdiction, the presumption is in favor of the regularity of the proceedings—40 Cal. 655. See *ante*, §§ 774-794.

Subd. 2. That the indictment did not contain the particular circumstances of the offense is a ground for demurrer—49 Cal. 390. See *ante*, §§ 950, 959. Where there are two counts and one of them is good, a general demurrer will be overruled—6 Pac. C. L. J. 610. The omission to state any description of the property stolen is ground for demurrer—40 Cal. 277; 36 id. 247; so, it will not lie for a failure to give an appellation to the offense—39 Cal. 331. It will not lie to a part of a count—42 Md. 563; Law R. 3 H. L. 306. It will not avail when the offense is set forth with substantial accuracy—38 Md. 186; 39 id. 352. See *ante*, §§ 950, 959.

Subd. 3. Charging two offenses is a ground for demurrer—43 Cal. 2; 47 id. 108; 27 id. 394; 35 id. 115. See *ante*, § 954, and note.

Subd. 4. See *ante*, § 990.

1005. The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of objection to the indictment or information, or it must be disregarded. [In effect April 9th, 1880.]

1006. Upon the demurrer being filed, the argument upon the objections presented thereby must be heard, either immediately or at such time as the court may appoint.

1007. Upon considering the demurrer, the court must give judgment, either allowing or disallowing it, and an order to that effect must be entered upon the minutes.

Judgment on demurrer.—The rule that judgment may be given against the party who committed the first substantial error is applicable to criminal cases—53 Mo. 438; 4 Parker Cr. R. 217. If there are two counts, and one of them is good, the indictment is good on general demurrer—6 Pac. C. L. J. 610; 40 Ala. 21; 39 Id. 247; 5 Cush. 295. An order sustaining a demurrer to an indictment is a final judgment from which an appeal lies—47 Cal. 113; 39 Id. 604; 3 Cranch, 159; 3 Cush, 212; 2 N. Y. 9; 2 Va. Cas. 202; 2 Ill. 257; 13 Id. 341; 17 Wis. 669; 5 Litt. 239; 14 Bush, 525; 6 Yerg. 360; 66 N. C. 647; 71 Id. 263; 7 Ga. 422; 65 Mo. 497; 5 Tex. 1; 5 Har. & J. 317; 1 Ark. 428; 19 N. Y. 583.

1008. If the demurrer is allowed, the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the case to be submitted to another grand jury, or directs a new information to be filed; *provided*, that after such order of resubmission, the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases. [In effect April 9th, 1880.]

A judgment against the prosecution on a special demurrer is not final when the defects demurred to are merely formal. A new bill must be sent in with the defects cured—3 Cranch C. C. 441; 54 Ind. 434. And defendant will be held over to await a second indictment—43 Ala. 31.

1009. If the court does not permit the information to be amended, nor direct that an information be filed, or that the case be resubmitted, as provided in the preceding section, the defendant, if in custody, must be discharged, or if admitted to bail, his bail is exonerated, or if he has deposited money instead of bail, the money must be refunded to him. [In effect April 9th, 1880.]

1010. If the court directs that the case be resubmitted, the same proceedings must be had thereon as are prescribed in sections nine hundred and ninety-seven and nine hundred and ninety-eight.

1011. If the demurrer is disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may direct. If he does not plead, judgment may be pronounced against him.

Demurrer overruled.—Where there is on the face of the pleading no admission of criminality on the part of defendant, he will be permitted to plead—13 Mass. 456; 3 Pen. & W. 262; 8 Watts. 77; 9 Mo. 637; see 3 Helsk. 33; 11 Mo. 383; id. 366; 35 Miss. 366; 3 Met. 453. In some jurisdictions he will not be permitted as a matter of right, but must lay sufficient grounds before permission will be granted—28 Cal. 265; 29 id. 562; 37 Me. 329; 54 id. 569; 17 Vt. 151; 19 Conn. 478; 2 Yerg. 472; 8 Humph. 32; 6 Leigh, 638; see 3 Denio, 91; 2 N. Y. 1. Where the indictment is adjudged good on demurrer the prisoner may except, and if the exception is sustained judgment may be rendered in his favor; if overruled judgment may be rendered for the state, unless the prisoner has reserved his right to plead anew—54 Me. 569. In this State if a general demurrer be overruled, and defendant refuses to plead, the court may direct a plea of "not guilty" to be entered for him—28 Cal. 265; 29 Cal. 563; see 6 Leigh, 638; 21 Wend. 409. See *ante*, § 639.

1012. When the objections mentioned in section one thousand and four appear on the face of the indictment or information, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial, in arrest of judgment. [In effect April 9th, 1880.]

When objections must be taken.—Objections appearing on the face of the indictment can only be taken advantage of by demurrer—47 Cal. 108.

CHAPTER IV.

PLEA.

- § 1016. The different kinds of pleas.
- § 1017. Plea, how put in, and its form.
- § 1018. Plea of guilty, how put in, and when withdrawn.
- § 1019. What plea of not guilty puts in issue.
- § 1020. What may be given in evidence under plea of not guilty.
- § 1021. What is not a former acquittal.
- § 1022. What is a former acquittal.
- § 1023. Conviction or acquittal for a higher offense, effect of.
- § 1024. Defendant refusing to answer, plea of not guilty.
- § 1025. Previous convictions. [Repealed.]

1016. There are four kinds of pleas to an indictment or information. A plea of—

1. Guilty.
2. Not guilty.
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty.
4. Once in jeopardy. [In effect April 26th, 1880.]

Subd. 1. By pleading guilty, defendant confesses his guilt as charged in the indictment, but if the indictment charges no offense, none is confessed—7 Eng. 169. It includes a plea of former conviction, and renders defendant liable for a felony—49 Cal. 395. Where the party pleaded by mistake, it may be corrected after entry on the minutes—20 Ga. 674; and the court may, in its discretion, allow it to be withdrawn—33 N. H. 143; 2 Nev. 321; 17 Law J. M. C. 145. A plea of guilty cures formal defects—27 Ohio, 572. If drawn out by the court telling defendant if he does not plead he will be heavily punished, it is a nullity—41 Mich. 623. In case of misdemeanors, a plea of guilty may be put in by an attorney, but in felonies it must be put in by defendant in person—23 Cal. 158; 28 id. 328; 8 Smedes & M. 587; 1 Curt. 433.

Subd. 2. A general plea of not guilty by several defendants is a several plea—2 Ired. 402.

Subd. 3. Where defendant pleads in bar and the general issue, and both are submitted at the same time, there must be a verdict in each, and it is error to take a verdict on the plea of not guilty alone—51 Cal. 278; 28 Pa. St. 14. On a plea of former acquittal, if the court holds the defendant could have been lawfully convicted on the former proceeding, the plea is good—2 Yerg. 24; 43 Wis. 395. Acquittal, even without the judgment of court, is a bar—41 Me. 165; 2 Zab. 212; but convictions do not follow this rule—5 Cranch C. C. 87; 128 Mass. 285; 2 Zab. 212;

Addis. 140; 14 Ohio, 295; 15 Ill. 511; 2 Yerg. 24; 6 Mo. 644; 1 Tex. Ct. App. 323; but see 25 Miss. 383; 29 N. Y. 124; as where the prosecuting officer, after conviction, concedes the badness of the indictment and proceeds on a second indictment—Addis. 140; or where the case is pending in error—126 Mass. 265; 97 U. S. 530; 13 Johns. 351; or where the indictment was stolen after verdict and before judgment—14 Ohio, 295; but ordinarily, a verdict of guilty will sustain the plea—43 Wis. 395; see 41 Me. 165. A plea of former conviction, to be a bar, need not have judgment entered—32 Cal. 432.

To make a plea of former acquittal or former conviction available, the court must have been competent, having jurisdiction—11 N. H. 156; 1 Va. Cas. 188; 42 N. H. 475; 13 Mass. 456; 12 Met. 337; 33 How. Pr. 91; 2 Ark. 229; 4 Blackf. 156; 12 Ind. 369; 14 Tex. 387; 4 Mo. 376; 6 Neb. 102; 1 Eng. 187; 3 Heisk. 321; 4 Mass. 477; see 62 Ind. 35; and the proceedings must have been regular—113 Mass. 200; but where the court has final jurisdiction, an acquittal or conviction is a bar, although the proceedings were defective—27 Me. 266; 3 Met. 323; see 37 Mo. 369; 5 Dana, 320. A judgment by a court-martial is no bar to an indictment in a State court—4 Cold. 145; nor is a prosecution in a State court a bar to proceedings by a U. S. court-martial—3 Op. Att.-Gen. 750; 6 id. 413; but a judgment of conviction of a military court in an insurgent State is a bar to a subsequent proceeding in a State court—97 U. S. 503; see 20 Law Reporter, 631; 4 Am. Law Reg. 534. A police summary conviction for a breach of a municipal ordinance is no bar to a prosecution for a breach of the public peace—6 Ind. 231; 6 Baxt. 567; 6 Oreg. 341; but see 37 Mo. 360; nor is a conviction to recover a penalty a bar to an indictment in the name of the State—10 Cent. L. J. 87. Proceedings for a contempt is no bar to a prosecution for the assault—2 Strange, 1107; see 5 Ired. 199; 2 Speers, 261; 1 Car. Law Rep. 519; 2 Op. Att.-Gen. 958. The utterance of forged coin may be punished by the State as a cheat—5 How. 410; and by the Federal government as forgery—9 How. 560; and one judgment cannot be pleaded in bar of the other—14 How. 13; but see 6 Neb. 121; 55 Ill. 430; 14 Ala. 486; 14 Md. 152 n. Where the judgment is reversed for an illegal sentence on conviction, where there was no error, the plea of former conviction is good—25 N. Y. 407; see 23 N. Y. 167; 23 id. 400; 29 id. 124.

Jeopardy.—Jeopardy attaches when a party is once put upon his trial before a competent court and jury upon a valid indictment, and an acquittal before the jury, or if the jury be discharged without legal consent, or unwarrantably—48 Cal. 325; 4 id. 376; 5 id. 278; 33 id. 467; 14 id. 479; 44 id. 35; 15 Ark. 261; 1 Bail. 651; 8 Blatchf. 526; 3 Brev. 421; 16 Conn. 54; 3 Cush. 212; 1 Eng. 169; 7 Ga. 422; 3 Hawks, 351; 2 Halst. 172; 17 Mass. 515; 2 Pick. 521; 7 Mo. 644; 19 id. 683; 3 Smedes & M. 751; 1 Swan, 14; 3 Tex. 118; 2 Tyler, 471; 8 Wend. 640; 7 Port. 187; 53 Miss. 363; 14 id. 439; or an arbitrary discharge—9 Bush. 333; or a discharge without good cause shown—26 Ind. 346; 27 id. 131; see 17 Iowa, 329; 29 id. 236; 3 Neb. 357; 11 Nev. 428; 33 Tex. 671; or if the defendant is acquitted for variance between indictment and proof—17 Cal. 333; 26 Ala. 135. It attaches where the verdict of guilty is rendered, and judgment is arrested for want of arraignment and plea—43 Wis. 395; 2 Yerg. 24. Jeopardy attaches on a discharge of the jury without the consent of the defendant, for any cause within the control of the court, before verdict rendered—4 Cal. 376; 5 id. 278; 33 id. 478; 1 Bail. 651; 3 Cush. 212; 2 Tyler, 471; 1 Blackf. 346; 5 id. 154; 7 id. 186; 8 id. 533; 17 Pick. 395; 5 Ind. 200; 1 Swan, 14; 9 Yerg. 333; 4 Hayw. 110; 1 Mart. & Y. 278; 6 Humph. 410; 10 Yerg. 535; 1 Hawks, 462; 3 id. 381; 2 Brev. 445; 3 id. 421; 1 Eng. 169; 14 id. 259; 3 Tex. 118; 8 Wend. 549; 2 N. Y. 9; 16 Conn. 54; 3 Smedes & M. 753; 6 Mo. 644; 19 id. 633; 8 Iowa, 230; 2 Halst. 172; 6 Serg. & R. 578; 7 Port. 188; 2 Ill. 257; 1 Va. Cas. 202; 2 Sum. 37; 2 McLean, 114. Defendant may waive his constitutional privilege by a consent to the discharge of the jury—38 Cal. 467; 26 Ala. 135; 35 id. 351; 60 Ind. 291; 3 Mass. 126; 21 Wend. 503; 15 Ohio St. 161; 37 Me. 156; 5

Cox C. C. 501; but see 34 Conn. 280; or to their separation—7 Cold. 516; 13 Allen, 555; 2 Gratt. 567; 7 Id. 662; 15 Ga. 562; 55 Id. 521; 3 How. (Miss.) 422; 1d. 429; 15 Mo. 153; 14 Ind. 589; 1 Humph. 102; but such consent cannot be made operative by motions in arrest or agreements that do not go to vacate all prior proceedings—5 Cal. 275; 55 Ga. 521; 11 Humph. 502; 12 La. An. 710; 43 Miss. 364; 15 Pa. St. 468; 1 Swan, 256; 1 Utah, 260; Holt, 403; 1 Craw. & D. 151. The constitutional right is intended to shield the prisoner from a second trial, except at his election and request, which is manifested by his application for a new trial—1 Cliff. 5; 1 McLean, 434; 3 Id. 573; 5 Id. 286; 1 Wall. Jr. 127; 6 Ala. 676. When the record shows, in a case in which jeopardy attaches, that the jury was discharged, the record must also specially state the ground of discharge—41 Cal. 211; 45 Id. 248; 43 Id. 323; 49 Id. 226; 35 Ala. 406; 26 Ga. 233; 66 N. C. 309; 64 Id. 364; 63 Id. 571; 26 Ind. 347; 1d. 366; 3 Ohio St. 230; 14 Id. 494; 24 Id. 134; 5 Allen, 216; 2 Pick. 521; 18 Johns. 187; 33 Tex. 67.

Jeopardy, when does not attach.—A party is not put in jeopardy until a verdict has been rendered—6 Bush, 563; 26 Ala. 135; 4 Id. 173; 35 Id. 406; 7 Id. 258; 18 Johns. 187; 2 Pick. 521; 2 Johns. Cas. 301; 14 Ohio St. 493; 26 Ind. 366; 20 Md. 425; 38 How. Pr. 91; Thach. C. C. 1; 25 Ark. 206; 27 Ind. 131; 64 Mo. 376; 65 Id. 497; 9 Wheat. 579; 4 Wash. C. C. 402; Walk. Ch. 134; and twice in jeopardy does not relate to a mistrial—4 Wash. C. C. 410; 7 Port. 187; 26 Ala. 135; 4 Id. 173; 9 Wheat. 579; 18 Johns. 187; nor where the jury is discharged from necessity—9 Wheat. 579; 2 Sum. 19; 6 Serg. & R. 577; Bald. 95; 1 McLean, 434; 7 Port. 187. In a capital case as well as in a misdemeanor—4 Wash. C. C. 402; as on account of absence of witnesses—20 Md. 425; see 3 Ben. 1. On a discharge of the jury on account of sickness of defendant, his consent will be implied—26 Ark. 260; 1 Bail. 651; 18 Johns. 187; see 9 Leigh, 623; 63 N. C. 204; 1 Craw. & D. 151; 2 Car. & P. 413; 2 Leach, 546. If a juror becomes ill during the trial, the jury may be discharged, and the prisoner tried anew—38 Cal. 467; 56 Ala. 129; 2 Mo. 135; 5 Humph. 601; 6 Id. 249; 9 Leigh, 613; 10 Yerg. 532; 4 Wash. C. C. 402; Thach. C. C. 1; Russ. & R. C. C. 234; 3 Craw. & D. 212; 2 Leach, 620; or where he becomes insane—4 Wash. C. C. 402. "Legal necessity" is not confined to cases of death, etc., when the discharge becomes inevitable—38 Cal. 457. The escape of a juror will warrant the discharge of the jury—4 Haist. 256; 1 Bail. 651; 1 Hale P. C. 295. So, the jury may be discharged on account of inability to agree, and this does not work an acquittal—48 Cal. 324; 33 Ga. 329; 64 Mo. 376; 65 Id. 497; 29 Pa. St. 323; 9 Wheat. 579; 18 Johns. 187; if they fail to agree after a reasonable time—7 Ala. 259; 35 Id. 406, but see 64 N. C. 364; 3 Rawle, 498; 43 Ala. 402; or where they do not agree on the last day of the term—Walk. Ch. 134; 7 Port. 187; 26 Ala. 135; Thach. C. C. 1. A statutory close of the term of court justifies a discharge, which is no bar to a second trial—48 Cal. 323; 2 Wheel. C. C. 473; 5 Ind. 270; 1 Va. Cas. 319; 2 Hill, (S. C.) 690; 7 Port. 187; 7 Ala. 259; 19 Id. 577; 1 Walk. (Miss.) 134; 39 Miss. 613; 64 Mo. 376; 10 Yerg. 132; 2 Humph. 70; 8 Id. 597; 13 Q. B. 716; 2 Fost. & F. 250; 3 Cox C. C. 489. If defendant is put on his trial, and the jury disagree, and the term is adjourned without the discharge being recorded, he must avail himself of such defense when put on his trial again, and by appeal if judgment should be reversed—45 Cal. 249. Where the indictment was defective, the defendant has not been in jeopardy—6 Cal. 543; 17 Id. 333; 25 Ark. 206; 49 Ala. 344; 39 Miss. 548; 2 Pick. 521; 3 Met. 328; 8 Id. 531; 2 Day, 504; 6 Serg. & R. 577; 3 Rawle, 498; 1 Johns. 66; 4 Ill. 363; 73 Id. 320; 88 Id. 160; 1 Hayw. (N. C.) 241; 3 Sneed, 235. The prisoner may be remanded for further proceedings—Hemp. 299. Jeopardy does not attach where the judgment was reversed at the instance of the accused—2 Ala. 102; 16 Id. 781; 40 Id. 382. So, a defendant is not in jeopardy who has had leave to withdraw his plea, and plead in abatement, which plea has been found for him—13 Allen, 554; 105 Mass. 189. The death of the judge, during a trial before the jury,

does not relieve a defendant from a second trial—38 Cal. 467; 4 Ala. 272; 4 Stewt. & P. 72; 32 Ind. 480; or from an indictment for a misdemeanor—*id.* See 38 Cal. 467. Misconduct of the juror in breaking up the trial—4 Haist. 256; 10 Cox C. C. 574; and intermediate discovery of evidence of a juror's bias, is ground for withdrawal of a juror, and discharge of the jury—1 Curt. 23; see 13 Wend. 351; 3 Ill. 326; see also, 4 Wash. C. C. 402; 11 Cox C. C. 142; but not unless upon application of defendant, or unless the defect was such that he was really never in jeopardy—1 Bail. 651; 9 Bush, 333; 29 Ark. 31; 3 Ill. 327; 1 Leigh, 399; 3 Ohio St. 239; 8 Barn. & C. 417; 8 Ad. & E. 831; Car. & M. 647. The record evidence of proceedings at a previous trial is not admissible to prove former jeopardy—53 Cal. 690. See Const. Prov. *ante*, p. 17.

1017. Every plea must be oral, and entered upon the minutes of the court in substantially the following form:

1. If the defendant plead guilty: "The defendant pleads that he is guilty of the offense charged."

2. If he plead not guilty: "The defendant pleads that he is not guilty of the offense charged."

3. If he plead a former conviction or acquittal: "The defendant pleads that he has already been convicted (or acquitted) of the offense charged by the judgment of the court of — (naming it), rendered at — (naming the place), on the — day of —."

4. If he plead once in jeopardy: "The defendant pleads that he has been once in jeopardy for the offense charged (specifying the time, place, and court)." [In effect April 26th, 1880.]

Plea.—Every plea must be oral—47 Cal. 124; 55 *id.* 298. The omission to plead is fatal to the judgment, even after verdict—52 Cal. 481; 54 Mo. 321; 63 *id.* 296. On appeal, if the record fails to show arraignment and plea, the court will assume that there was no arraignment nor plea—52 Cal. 481; 3 Wis. 830. A plea in abatement, or a special plea not involving a statement of fact, is exclusively for the court—46 Miss. 683; and two may be pleaded at the same time when not repugnant—2 Va. Cas. 318. They must always be tried before the general issue—8 Allen, 545; 28 Pa. St. 13; 39 Ala. 239; 33 *id.* 389; 34 *id.* 211; 49 *id.* 344; 3 Heisk. 33; 42 Ind. 420. The objection that the grand jury has not been drawn, summoned, and impaneled, according to law, must, in some jurisdictions, be made by plea in abatement—5 Port. 474; 4 Dev. 305; 6 Blackf. 248; 12 Smedes & M. 68. It is too late to raise the objection in appellate court—37 Ala. 469; 30 *id.* 511; but see 6 Blackf. 104; 3 Parker Cr. R. 272; 25 N. Y. 308; 47 Ala. 58; 2 Ashm. 90. After the impanelling and swearing of several trial jurors, it is in the discretion of the court to entertain the objection—43 N. Y. 28.

Subd. 1. See 49 Cal. 395.

1018. A plea of guilty can be put in by the defendant himself only in open court, unless upon indictment or information against a corporation, in which case it may

be put in by counsel. The court may, at any time before judgment, upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted. [In effect April 9th, 1880.]

Plea of guilty.—The plea of guilty should not be entered, except with the express consent of defendant given personally, in direct terms in open court—41 Cal. 461. The court may, in its discretion, allow the plea of guilty to be withdrawn—24 N. H. 143; see 2 Nev. 321. When there is reason to believe it has been entered through inadvertence, and mainly from the hope that punishment would be mitigated, the court should permit it to be withdrawn—41 Cal. 462; but the party should not be permitted to trifle, by entering a plea one day, and capriciously withdrawing it the next—*id.* The Supreme Court will not reverse an order refusing to permit the plea of not guilty to be withdrawn—17 Cal. 76.

See *ante*, § 1016, note; 49 Cal. 395.

1019. The plea of not guilty puts in issue every material allegation of the indictment or information. [In effect April 9th, 1880.]

Plea of not guilty.—The plea of not guilty puts in issue all the material averments, including that of the *locus delicti*—52 Cal. 470; 44 *id.* 105; 48 *id.* 382; 9 *id.* 421. Under this plea insanity may be shown—28 Cal. 461. See *ante*, § 1016, note; 49 Cal. 395. Proceedings on plea of insanity—see *post*, §§ 1363-1372. The plea of not guilty puts in issue the averment of place where the crime was committed, and imposes on the prosecution the necessity of proving the *locus delicti*—52 Cal. 470.

1020. All matters of fact tending to establish a defense, other than that specified in the third and fourth subdivisions of section one thousand and sixteen, may be given in evidence under the plea of not guilty. [In effect April 26th, 1880.]

Involuntary intoxication.—If a person be made drunk by fraud or stratagem, or by the unskillfulness of a physician, he is not responsible for his acts—2 Parker Cr. R. 235; 31 Ga. 424; see 19 Mich. 401; 33 Ind. 543; 40 Conn. 136.

Insanity from intoxication may excuse from punishment for crime, as on a fixed frenzy or insanity, as *delirium tremens*—43 Cal. 344; 1 Ashm. 289; 50 Barb. 266; 48 *id.* 274; 6 Parker Cr. R. 209; 1 Curt. 1; 2 Cranch C. C. 153; Crabbe, 553; 1 Duval, 234; 20 Gratt. 860; 3 Har. (Del.) 551; 5 *id.* 510; 26 Ind. 422; 4 *id.* 563; 31 *id.* 492; 3 Jones, (N. C.) 245; Mart. & Y. 147; 5 Mason, 23; 19 Mich. 401; 46 Mo. 414; 18 N. Y. 9; 5 Ohio St. 77; 12 Tex. 500; or *mania a potu*—3 Har. (Del.) 551.

Intoxication.—Voluntary intoxication is no excuse for crime—27 Cal. 507; 36 *id.* 531; 49 *id.* 485; 7 Abb. Pr. 321; 13 Ala. 413; 54 Barb. 319; 50 *id.* 226; 2 Brewst. 546; 8 Bush, 464; Crabbe, 558; 2 Cush. 500; 2 Cranch C. C. 153; 1 Curt. 1; 2 *id.* 19; 2 Dall. 83; 1 Duval, 224; 2 *id.* 163; 55 Ga. 31; 45 *id.* 225; 3 Gray, 463; 20 Gratt. 860; 5 Har. (Del.) 510; 9 Humph. 663; 11 *id.* 154; 66 Ill. 118; 66 Ind. 185; 53 *id.* 182; 40 *id.* 263; 14 Kans. 538; 27 La. An. 621; 22 *id.* 587; 2 Mason, 91; 5 *id.* 28; Mart. & Y. 147; 2 Met. (Ky.) 1; 114 Mass. 225; 21 Minn. 22; 14 Mo. 502; 65 *id.* 530; 58 *id.* 556; 12 Nev. 140; 44 N. H. 392; 31 N. Y. 330; 2 Parker Cr. R. 14; 5 *id.* 621; 1 Strob. 479; 3 Smedes & M. 518; 12 Tex. 500; 24 Wis. 452; 1 Wright, 520; 50 Vt. 483;

even where so extreme as to make the person unconscious of his acts—17 Mich. 9; 3 Heisk. 202. It does not aggravate a criminal act; it simply furnishes no excuse—38 Ill. 514. It neither excuses nor palliates passion or malice—1 Duval, 224; 2 id. 163; 11 Humph. 154; 1 Spear, 384; 3 Smedes & M. 518; 8 Ohio St. 437; 25 id. 369; see 9 Humph. 663; 8 Ired. 330; 2 Parker Cr. R. 235; 25 id. 223; nor lower the grade of the offense—Addis. 255; 13 Ala. 413; 8 Bush. 433; 40 Conn. 584; 3 Gray, 468; 2 Keyes, 424; 20 Gratt. 860; 38 Ill. 514; 65 Mo. 530; 14 La. An. 570; 12 Nev. 140; 8 Ohio St. 435; 2 Mason, 91. Nor does it extenuate crime—27 Cal. 507; 29 Cal. 678; 21 id. 534; 114 Mass. 295. Nor furnish an inference of the absence of premeditation—48 Barb. 574; 36 N. Y. 276; 27 Mo. 332; see *ante*, § 22.

Intoxication.—Though intoxication does not extenuate or excuse crime, yet it may be receivable in evidence to determine the degree of the offense—27 Cal. 507; 3 Parker Cr. R. 632; 18 N. Y. 9; or to determine what specific offense was committed—21 Cal. 544; 27 id. 507; 43 id. 444; 36 id. 531; 13 Ala. 413; 33 id. 419; 2 Brewst. 546; 1 Duval, 224; 2 id. 163; 25 Ga. 527; 29 id. 594; 33 id. 449; 9 Humph. 663; 4 id. 138; 19 Mich. 401; 11 Minn. 154; 16 Ind. 423; 2 Lea, (Tenn.) 578; 1 Spear, 384; 43 Tex. 503; 2 Tex. Ct. App. 275; 4 id. 275; 10 id. 461; or to test the condition of the mind, and its capacity to form an intention—34 Cal. 212; 27 id. 507; 1 Dak. 203; 31 N. Y. 330; or to show that he was not capable of deliberation, or of attack or defense—40 Conn. 136; 9 Kans. 119; or incapable of judging his acts or their consequences—21 Cal. 544; 37 id. 507; 44 Pa. St. 55; 19 Mich. 401; 11 Humph. 154; 4 id. 136; 9 id. 663; 8 id. 571; 1 Spear, 384. It may be shown in mitigation of punishment—2 Bush. 67; 5 id. 362; 7 id. 320; 8 id. 463; 1 Duval, 224. Evidence of intoxication should be received with great caution, for a drunken man may act with premeditation as well as another—38 Cal. 531. See *Desty's Crim. Law*, §§ 27, b, c.

Proof of insanity.—Under the plea of not guilty the insanity of defendant at the time of the act may be given in evidence—28 Cal. 461; but it should be examined with great care—33 Cal. 625. The presumption of law is that defendant was sane till the contrary is shown from preponderance of proof—20 Cal. 518; see 6 id. 543. Habitual, but not temporary or spasmodic insanity raises the legal presumption of its continuance—38 Cal. 183; 17 Cal. 424. The insanity of defendant's parents may be shown when there appears to be no motive for the act, or where there is evidence of insanity of the defendant—31 Cal. 466. See *post*, § 1369, and note.

Statute of limitations.—The statute of limitations need not be specially pleaded—17 Wall. 168; 4 Day, 121; 3 Cranch C. C. 441; 5 id. 73; 1 Low. 267; 23 N. H. 274; 28 Pa. St. 259; *contra*, 5 Parker Cr. R. 231; 74 N. C. 230; 4 Ga. 335; 10 Humph. 52; 8 Ind. 494; 7 Iowa, 409.

Excuse and justification.—Misfortune or accident as an excuse—see *Desty's Crim. Law*, §§ 30, a, b; *ante*, § 26, subd. 6. Acts done under compulsion or duress—*id.* §§ 32, a, b; *ante*, § 26, subd. 8. Consent of party injured, as an excuse—see *Desty's Crim. Law*, §§ 33, a, b. Ignorance or mistake of law, as an excuse—*id.* §§ 34, a, b. Ignorance or mistake of fact—*id.* §§ 35, a, b; *ante*, § 26, subd. 4.

Self-defense.—The right of self-defense is based on necessity—27 Cal. 572. The owner of a house may use force necessary to repel an assault—8 Cal. 341; Addis. 246. The act of raising the window in the night is not sufficient to rouse the fears of a reasonable man so as to excuse the use of a deadly weapon, without first warning the intruder off—43 Cal. 447; 90 Ill. 221. A party assaulted is justified in using such force as is necessary to repel assailant, but no more—31 Cal. 280; 30 id. 312; 44 id. 65; 2 Minn. 270; 1 Ohio St. 66. He may use whatever force is necessary to avert apparent danger, although it afterward appears there was no real danger—44 Cal. 69; and his guilt or innocence depends on the circumstances as they appear to him—55 Cal. 207; 44 id.

67; 54 Barb. 342; 46 id. 625; 32 N. Y. 509; and if, without fault or carelessness, he is misled concerning them, and defends according to the supposed state of facts, he is justifiable, although the facts are in truth otherwise, and there is really no occasion for extreme measures—55 Cal. 202; *People v. Miles*, 55 Cal. 207. Mere antecedent threats is no excuse for a deadly assault, when no demonstration is made by the party threatening—45 Cal. 261. See *Desty's Crim. Law*, title HOMICIDE.

1021. If the defendant was formerly acquitted on the ground of variance between the indictment or information and the proof, or the indictment or information was dismissed upon an objection to its form or substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense. [In effect April 9th, 1880.]

Acquittal, when not a bar.—A former acquittal or conviction procured by fraud is no bar—4 Mass. 477; 111 id. 404; 48 Mo. 70; 32 Ark. 722; 16 Iowa, 239; 4 Blackf. 345; 31 Ill. 409; 7 Ga. 422; 1 Swan, 34; 16 Conn. 54; 26 id. 202; 9 Humpb. 677; 11 id. 599; 1 Head, 270; 2 How. St. Tr. 544; *Sayers*, 90. An acquittal of burglary, with intent to steal, is not a bar to a prosecution for larceny—20 Cal. 622; 14 Ga. 8; 2 Hawks, 98; 46 Ala. 717; 14 Ind. 572; so, a discharge on a preliminary examination—18 Kan. 608; nor a discharge by a grand jury—2 Ashm. 61; 2 Moody & R. 503; and see 5 Ga. 81; or where the indictment was quashed—126 Mass. 246; 32 Ark. 231. Evidence that a former indictment had been set aside on the ground that the grand jury had not been legally constituted, and that the court had ordered the case submitted to another grand jury, will not sustain a plea of former acquittal—53 Cal. 630. A former pending indictment is no bar to a trial on the second—5 Cranch C. C. 87; 3 Cush. 279; 11 id. 473; 5 Gray, 93; 126 Mass. 265; 14 Wend. 9; 28 Gratt. 950; 2 Dev. & B. 159; 78 N. C. 558; 5 Ind. 532; 22 id. 347; 36 Miss. 614.

Variance.—Immaterial variance should be disregarded—41 Cal. 236; if the defendant be in fact acquitted on the ground of immaterial variance, he cannot be again prosecuted for the same offense—41 Cal. 236; but if the variance be material, it is not a bar—41 Cal. 236. Where the indictment charged stealing of five certificates of shares of stock of the No. 7056, and the proof showed there was but one such certificate, and not a series of five, it was not a fatal variance—45 Cal. 673; see *ante*, § 1016, and *post*, § 1112; see 49 Cal. 395.

1022. Whenever the defendant is acquitted on the merits, he is acquitted of the same offense, notwithstanding any defect in form or substance in the indictment or information on which the trial was had. [In effect April 9th, 1880.]

Former acquittal.—Where a person is put on trial on a valid indictment, before a competent court and jury, a discharge of the jury without his consent, or from some unavoidable accident or necessity, is equivalent to an acquittal—48 Cal. 326; 24 id. 41. So, if the prosecuting attorney enters a *nolle prosequi* after the jury is impaneled and sworn, the accused cannot be again indicted for the same offense—24 Cal. 41; 8 Ala. 951; 16 id. 781; 4 id. 9; 54 id. 93; 8 Barb. 158; 1 Ball. 651; 7 Blackf. 186; 8 id. 545; 4 Cranch C. C. 465; 2 Calmes, 304; 5 Cold. 311; 1

Dev. 491; 3 Ga. 53; 9 id. 306; 55 id. 625; 7 Gray, 328; 1 Humph. 253; 5 Ind. 290; 2 McLean, 114; 49 N. H. 155; 14 Ohio, 295; 12 Ohio St. 214; 20 Pick. 356; 23 Pa. St. 12; Thach. C. C. 132; 12 Vt. 93; 3 W. Va. 700; but it is otherwise where defendant was not in jeopardy—2 Brewst. 567; 1 Curt. 23; 42 Conn. 432; 7 Gray, 328; 35 Tex. 98; 12 Vt. 93. If, while the jury is out deliberating, and before the expiration of the term, the judge, without calling the jury into court, adjourns for the term, it is equivalent to an acquittal—48 Cal. 329. Surprise, in the sudden breaking down of the case of the prosecution, will not justify withdrawing of a juror—2 Caines, 305; 2 McLean, 114; 2 Parker Cr. R. 676; 2 Strange, 984; but see *contra*, 13 Ired. 203; 15 Wend. 371.

1023. When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information. [In effect April 26th, 1880.]

Higher offense.—On an indictment for murder, defendant was found guilty of manslaughter, and on a second indictment for murder, his former conviction was a good plea, though a new trial had been granted on his motion—4 Cal. 376; 5 id. 278. A conviction of manslaughter is an acquittal of every higher offense, and so of all offenses included in an indictment—35 Cal. 391. If a person is indicted for manslaughter, and the court, without consent of defendant, discharges the jury because it is of opinion that the evidence shows defendant guilty of murder, if he is again indicted for the same killing, he is twice in jeopardy, and is entitled to acquittal—48 Cal. 334. See *ante*, § 1016, subd. 3.

1024. If the defendant refuses to answer the indictment or information by demurrer or plea, a plea of not guilty must be entered. [In effect April 9th, 1880.]

Refusal to plead.—If a defendant stands mute, a plea of not guilty can be entered by order of court—125 Mass. 397; 76 Pa. St. 319; 5 Whart. 67; 10 Cox C. C. 409; so if he refuses or declines to plead after demurrer overruled—28 Cal. 274; 29 id. 562. A refusal to plead does not admit jurisdiction—30 Mich. 371.

1025. Section one thousand and twenty-five of said Code is hereby repealed. [In effect April 9th, 1880.]

CHAPTER V.

TRANSMISSION OF CERTAIN INDICTMENTS FROM THE COUNTY COURT TO THE DISTRICT COURT OR MUNICIPAL CRIMINAL COURT OF SAN FRANCISCO.

§ 1028. Transmission of indictments from the County to District Courts. [Repealed.]

§ 1029. Indictments against a superior judge.

§ 1030. Indictments transmitted to Municipal Criminal Court. [Repealed.]

1028. Repealed. [In effect March 12th, 1880.]

1029. When an indictment is found, or an information filed in a Superior Court against a judge thereof, a certificate of that fact must be transmitted by the clerk to the governor, who shall thereupon designate and direct a judge of the Superior Court of another county to preside at the trial of such indictment or information, and hear and determine all pleas and motions affecting the defendant thereunder before and after judgment. [In effect March 12th, 1880.]

1030. Repealed. [In effect March 12th, 1880.]

CHAPTER VI.

REMOVAL OF THE ACTION BEFORE TRIAL.

- § 1033. When action may be removed.
- § 1034. Application for removal, how made.
- § 1035. Application, when granted.
- § 1036. Order of removal.
- § 1037. Proceedings on removal, if defendant is in custody.
- § 1038. Proceedings on removal. Transmission of papers.

1033. A criminal action may be removed from the court in which it is pending, on the application of the defendant, on the ground that a fair and impartial trial cannot be had in the county where the action is pending.

[In effect April 9th, 1880.]

Removal of place of trial.—The only provisions of law for the removal of the place of trial of a criminal action are contained in the Penal Code, commencing with § 1033; and the only ground is that a fair and impartial jury cannot be obtained in the county—6 Pac. O. L. J. 743. Where the court transferred the case to another county on the ground of disqualification of the judge, it exceeded its jurisdiction—*id.* Bias or prejudice of the presiding judge is no legal ground—23 Cal. 495; 24 *id.* 31; 18 *id.* 185; 12 *id.* 523. That the judge previously in the same case made an erroneous ruling, is no evidence of the existence of bias and prejudice—24 Cal. 31.

1034. The application must be made in open court, and in writing, verified by the affidavit of the defendant, a copy of which must be served on the district attorney at least one day before the application is made. Whenever the affidavit shows that the defendant cannot safely appear in person to make the application, because the popular excitement against him is so great as to endanger his personal safety, and such statement is sustained by other testimony, the application may be made by counsel, and heard and determined in the absence of the defendant, though he is indicted for felony, and has not at the time of such application been arrested, or given bail, or been arraigned, or pleaded or demurred to the indictment.

Change of place of trial.—The venue of a case may be changed at the discretion of the court on good cause shown—53 Cal. 567; 44 id. 95; 49 id. 425; 48 Ala. 85; id. 180; 29 Ark. 225; 4 Denio, 150; 54 Ga. 371; 1 Hill, 179; 52 Ind. 215; 53 id. 408; 44 Iowa, 667; 55 Mo. 440; 65 id. 454; 15 Kan. 407; 20 id. 311; 8 S. C. 237; 45 Tex. 148; 6 Tex. Ct. App. 257; 35 Wis. 294; id. 303. The venue may be changed as to one of several defendants—25 Mo. 439; 2 Ired. 101; 1 Greene, 464.

Application for removal.—The affidavit must state facts and circumstances from which the conclusion is deduced, that a fair and impartial trial cannot be had in the county where the indictment is found—1 Cal. 379; 3 id. 412. The affidavit that he cannot have a fair and impartial trial in the county is not alone sufficient—21 Cal. 265; 2 McCord, 302; 10 Gratt. 658; 7 Hill, 147; 5 Barn. & Adol. 347; see 18 Cal. 186; nor is the mere fact that thirty or forty persons in the county had subscribed money to procure a lawyer to aid the prosecuting attorney—21 Cal. 265, questioning 5 Cal. 353. A mere opinion or belief set forth in the affidavit, that a fair trial cannot be had, is not sufficient—44 Cal. 95; see 28 id. 495. The application is addressed to the sound discretion of the court—49 Cal. 427; 18 id. 186; 6 id. 155; 53 id. 567; 44 id. 95; 3 id. 410; the exercise of which must be reasonable—53 id. 567; 18 id. 186; to be disposed of in furtherance of justice—44 id. 95; 6 id. 155; and the order of removal will not be disturbed except in case of gross abuse of discretion—6 id. 155; 18 id. 180. The granting of time to file counter affidavits is in the discretion of the court—22 Cal. 131. The application cannot be made after twelve competent jurors are obtained—49 Cal. 170; and the burden is on the petitioner to make out a case—3 Hun, 560.

1035. If the court is satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper court of a county free from a like objection.

See 53 Cal. 567.

1036. The order of removal must be entered upon the minutes, and the clerk must immediately make out and transmit to the court to which the action is removed a certified copy of the order of removal, record, pleadings, and proceedings in the action, including the undertakings for the appearance of the defendant and of the witnesses.

1037. If the defendant is in custody, the order must direct his removal, and he must be forthwith removed by the sheriff of the county where he is imprisoned, to the custody of the sheriff of the county to which the action is removed.

1038. The court to which the action is removed must proceed to trial and judgment therein as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such

court, the court from which the action is removed must at any time, upon application of the district attorney or the defendant, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained.

Arraignment.—If arraignment had been made in the place where the indictment was found, it need not be made at the place to which the trial is removed—39 Md. 355; 8 Gill, 295; 2 Va. Cas. 162; 58 Ga. 35; 36 Ala. 232; though a double arraignment would not be error—4 Ill. 83.

CHAPTER VII.

THE MODE OF TRIAL.

§ 1041. Issue of fact defined.

§ 1042. How tried.

§ 1043. When presence of defendant is necessary on the trial.

1041. An issue of fact arises:

1. Upon a plea of not guilty.
2. Upon a plea of a former conviction or acquittal of the same offense.
3. Upon a plea of once in jeopardy. [In effect April 26th, 1890.]

Subd. 1. If the indictment charged only manslaughter, and words are interpolated, making it charge murder, and defendant pleads guilty and goes to trial, he may prove the interpolation, and can be tried for manslaughter only—50 Cal. 448. Consent cannot confer jurisdiction to try for any offense other than that charged—50 Cal. 448. See ante, § 1016; see also 29 Cal. 402.

1042. Issues of fact must be tried by jury, unless a trial by jury be waived in criminal cases not amounting to felony, by the consent of both parties expressed in open court and entered in its minutes. In cases of misdemeanor the jury may consist of twelve, or any number less than twelve upon which the parties may agree in open court. [In effect February 25th, 1890.]

Trial by jury.—The right of trial by jury is a sacred right, and one secured by the guarantees of the Constitution—43 Cal. 146. See Const. Prov. ante, p. 16. A defendant cannot, without express statutory authority, waive his right to a trial by jury on a plea of not guilty—27 Conn. 281; 16 Mich. 351; 10 Mo. 498; 6 Ark. 601; 5 Ohio St. 283; 12 Id. 322; 43 Wis. 403; 17 Ark. 290; 9 Mich. 193; 36 Md. 259; see 41 Mo. 470; 21 Ark. 228; 20 Alb. L. J. 299. The action of a police magistrate in com-

mitting a minor child to the industrial school, does not amount to a criminal prosecution, nor to procedure according to the course of the common law, and the minor, therefore, is not entitled to a trial by jury—51 Cal. 280. Aliens are not entitled to a jury of one-half aliens—51 Cal. 597. See *ante*, page 16.

1043. If the prosecution be for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant; if, however, his presence is necessary for the purpose of identification, the court may, upon application of the district attorney, by an order or warrant, require the personal attendance of the defendant at the trial. [In effect April 9th, 1880.]

Right to appear in person—42 Cal. 168. See Const. Prov. *ante*, p. 16. It is error to declare a bond forfeited because defendant failed to appear personally at the trial—6 Pac. C. L. J. 450; 23 Cal. 158. See *ante*, §§ 976, 1016. Distinction between felonies and misdemeanors—see *ante*, § 17. Where one is indicted for a felony, and has been committed to bail, the court should at the commencement of the trial, order him into actual custody—49 Cal. 42.

CHAPTER VIII.

FORMATION OF THE TRIAL JURY AND THE CALENDAR OF
ISSUES FOR TRIAL.

- § 1046. Formation of trial jury.
- § 1047. Clerk to prepare a calendar.
- § 1048. Order of disposing of issues on the calendar.
- § 1049. Defendant entitled to two days to prepare for trial.

1046. Trial juries for criminal actions are formed in the same manner as trial juries in civil actions.

Impanneling trial jurors—see Code Civ. Proc. §§ 246, 247; see *post*, § 1074, note. If jurors are not drawn and summoned to attend the term of the court, an order may forthwith issue directing the sheriff to summon them—47 Cal. 95; 5 Blatchf. 204; and it is immaterial whether the cause for the necessity arose before or after the commencement of the term—43 Cal. 349; 4 id. 225; 21 id. 400. The names of all jurors selected, whether as grand or trial jurors, are to be placed in the same box—6 Pac. C. L. J. 399. A trial jury must consist of twelve, and defendant cannot consent to a less number—48 Cal. 258; 46 id. 122; 37 id. 677. The omission of the clerk to insert, in his certificate of the drawing, the date of the order for the drawing, is not a fatal error—6 Pac. C. L. J. 882. If, though legally drawn, they have not been summoned, the court may order them summoned—46 Cal. 47.

1047. The clerk must keep a calendar of all criminal actions pending in the court, enumerating them according to the date of the filing of the indictment or information, specifying opposite the title of each action whether it is for a felony or a misdemeanor, and whether the defendant is in custody or on bail. [In effect April 9th, 1890.]

1048. The issues on the calendar must be disposed of in the following order, unless for good cause the court shall direct an action to be tried out of its order:

1. Prosecutions for felony, when the defendant is in custody.
2. Prosecutions for misdemeanor, when the defendant is in custody.
3. Prosecutions for felony, when the defendant is on bail.

4. Prosecutions for misdemeanor, when the defendant is on bail. [In effect April 9th, 1880.]

A felony is a crime which is or may be punishable with death, or by imprisonment in the State prison—see Desty's Crim. Law, § 3, and note; see also *ante*, § 17. Every other crime is a misdemeanor—see Desty's Crim. Law, § 4, and note; see also *ante*, § 17.

1049. After his plea, the defendant is entitled to at least two days to prepare for trial.

CHAPTER IX.

POSTPONEMENT OF THE TRIAL.

§ 1052. Postponement, when, and how ordered.

1052. When an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day. [In effect April 9th, 1880.]

Postponement of trial.—Sickness of defendant's counsel—4 Cal. 188, or surprise at the withdrawal of a witness is a ground—4 Tex. 260; 46 Ga. 208. The surprise must be shown by affidavit, or in some other proper form—22 Cal. 348. The absence of witnesses is a ground for continuance—6 Cal. 249; 28 id. 445. A motion on this ground should distinctly state that to which they would testify—48 Cal. 63. Where there is a sufficient showing as to their materiality, and no apparent lack of diligence, the motion should be granted—46 Cal. 103; 41 id. 461; 23 id. 447. The court will not grant the motion when the absent witnesses are beyond its process—49 Cal. 580; 1 Const. S. C. 234; 3 Brev. 304; 2 Halst. 220; 1 Mass. 6; 8 Gratt. 695; 2 Sum. 19; and where they had made depositions before the examining court—49 Cal. 580; but see 43 Mo. 127; nor, where the facts shown cast suspicion on the good faith of the applicant—46 Cal. 120; nor, where he is guilty of laches and delays—29 id. 562; 1 Ashm. 281; 9 Dana, 302; 12 Fla. 562; 28 Ind. 22; 12 Gratt. 564; 28 id. 930; 54 Mo. 274; 63 id. 305; 6 Rand. 673; 1 Mass. 9; 2 Va. Cas. 156; nor, of any connivance—10 Gratt. 658; nor, where the testimony sought is immaterial—43 Cal. 47; 4 id. 238; 3 Brev. 304; 17 Ga. 439; 21 Tex. 337; 45 Ill. 152; 5 Leigh, 715; nor, where the opposite party concedes the fact sought to be proved—34 Ga. 348; 60 Ill. 168; 33 Miss. 48; 3 Parker Cr. R. 199; but the admission of the prosecuting attorney, that the absent witness told the prosecuting witness of the fact, will not defeat the motion—54 Cal. 243; see 28 id. 445; 1 Meigs, 195; 28 Ind. 30; 29 Tex. 464. A continuance as to one of several defendants does not involve the trials as to another—31 Ind. 262.

Affidavit.—The affidavit, on the ground of absence of witnesses, must show due diligence to procure their attendance, setting forth the facts—1 Cal. 403; 4 id. 241; 8 id. 89; 24 id. 38; 34 id. 663; 6 Pac. C. L. J. 223; 14 Bush, 106; 63 Mo. 444; as, by exhausting the process of the court, or otherwise—4 Cal. 238; 38 id. 188; 24 id. 31; and the service of the process must be described as such as would command obedience under the law—29 id. 562; and that the witnesses cannot be readily reached by attachment—47 id. 108. It should state that there is reasonable ground to believe that the delay will tend to the furtherance of justice, and that their attendance or testimony will be obtained at the time to which the trial is deferred—53 Cal. 613; 41 id. 458; 33 id. 188; 8 Gratt. 695; 15 Ga. 535; 42 Ind. 244; 1d. 544; 59 Mo. 418; 2 Va. Cas. 156; 46 Mo. 91; and that he cannot prove the same facts by other witnesses—47 Cal. 100; 43 id. 63; 23 id. 158; 8 id. 89; 4 id. 240. Where the affidavit contradicted his testimony taken before the grand jury, the application is properly denied—53 Cal. 494. So, where the affidavit shows that the witness is a fugitive from justice, and cannot probably be produced—49 Cal. 580. See *post*, § 1433.

TITLE VII.

Of Proceedings after the Commencement of the Trial and before Judgment.

- CHAP I. CHALLENGING THE JURY, §§ 1055-88.
- II. THE TRIAL, §§ 1093-1131.
- III. CONDUCT OF THE JURY AFTER CAUSE IS SUBMITTED TO THEM, §§ 1135-43.
- IV. THE VERDICT, §§ 1147-67.
- V. BILLS OF EXCEPTION, §§ 1170-6.
- VI. NEW TRIALS, §§ 1179-82.
- VII. ARREST OF JUDGMENT, §§ 1185-8.

CHAPTER I.

CHALLENGING THE JURY.

- § 1055. Definition and division of challenges.
 - § 1056. Defendants cannot sever in challenges.
 - § 1057. Panel defined.
 - § 1058. Challenge to the jury defined.
 - § 1059. Upon what founded.
 - § 1060. When and how taken.
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 - § 1063. Denial of challenge, how made, and trial thereof.
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 - § 1067. Kinds of challenges to individual juror.
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 - § 1071. Definition and kinds of challenge, for cause.
 - § 1072. General causes of challenge.
 - § 1073. Particular cause of challenge.
 - § 1074. Ground of challenge for actual bias.
 - § 1075. Exemption not a ground of challenge.
 - § 1076. Causes of challenge, how stated.
 - § 1077. Exceptions to challenge and denial thereof.
 - § 1078. Challenge, how tried.
 - § 1079. Triers, how appointed. Majority may decide. [Repealed.]
 - § 1080. Oath of triers. [Repealed.]
 - § 1081. Juror challenged may be examined as a witness.
 - § 1082. Rules of evidence on trial of challenge.
 - § 1083. Decision of court to be entered.
 - § 1084. Instructions on trial for actual bias. [Repealed.]
 - § 1085. Verdict of triers, and its effect. [Repealed.]
 - § 1086. Challenges, first by the defendant.
 - § 1087. Order of challenges.
 - § 1088. Peremptory challenges, when may be taken.
155. A challenge is an objection made to the trial jurors, and is of two kinds:

PEN. CODE.—35.

1. To the panel.
2. To an individual juror.

Challenges.—The court may, of its own motion, for any good reason, excuse a qualified juror—32 Cal. 43; see 2 Mason, 91; 10 Gratt. 767; 20 Ga. 164; 2 Dev. & B. 231. The rejection of a juror by the court does not prejudice the defendant, and is not matter available in error—32 Cal. 46; 17 Id. 80; 7 Id. 140; 4 Gray, 19.

1056. When several defendants are tried together, they cannot sever their challenges, but must join therein.

Severing challenges.—Where defendants elect to be tried jointly they cannot sever their challenges—8 Cal. 301; 26 Ala. 107; 10 Ohio, 232; 10 R. I. 159.

1057. The panel is a list of jurors returned by a sheriff to serve at a particular court, or for the trial of a particular action.

1058. A challenge to the panel is an objection made to all the jurors returned, and may be taken by either party.

1059. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury in civil actions, or on the intentional omission of the sheriff to summon one or more of the jurors drawn.

Challenge to the panel.—A challenge to the panel is based on the partiality, or bias, or default of the officer making the return of the venire—49 Cal. 173; 1 Mann. (Mich.) 451; 1 Leach, 101; or if the statute requirements are not complied with—20 La. An. 356; 13 Minn. 341. It will not lie on the ground that the jury was summoned after commencement of the term—10 Cal. 59. That all persons of a particular fraternity have been excluded, is no ground of challenge, if those returned possess the requisite qualifications—3 Wend. 314. It must be taken before plea—8 Barn. & C. 417; 2 Moody & R. 406.

1060. A challenge to the panel must be taken before a juror is sworn, and must be in writing or be noted by the phonographic reporter, and must plainly and distinctly state the facts constituting the ground of challenge.

1061. If the sufficiency of the facts alleged as ground of the challenge is denied, the adverse party may except to the challenge. The exception need not be in writing, but must be entered on the minutes of the court, or of the phonographic reporter, and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

In writing.—It should be in writing—1 Mann. (Mich.) 451; 1 Car. & K. 235, 519. An amended challenge takes the place of the original—48 Cal. 256; see *post*, § 1068, note.

Trial by the court.—An opinion imperfectly formed, or one based upon the supposition that facts are as they have been represented, may be proved on such a challenge—2 Parker Cr. R. 16; 13 Fla. 675. A fixed opinion of guilt or innocence need not be proved when the challenge is for favor—*id.* And any fact or circumstance from which bias and prejudice may be inferred is admissible in evidence—1 Denio, 281; see 3 *id.* 121. It is not sufficient to prove that a juror has formed an unfavorable opinion of the defendant—2 Barb. 216; see *post*, § 1076, note.

1062. If, on the exception, the court finds the challenge sufficient, it may, if justice requires it, permit the party excepting to withdraw his exception, and to deny the facts alleged in the challenge. If the exception is allowed, the court may, in like manner, permit an amendment of the challenge.

Challenge to panel.—An amended challenge is a substitute for the original—48 Cal. 256.

1063. If the challenge is denied, the denial may be oral, and must be entered on the minutes of the court, or of the phonographic reporter, and the court must proceed to try the question of fact; and upon such trial, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

Evidence on challenge.—The defendant cannot offer his *ex parte* affidavit in evidence in support of the challenge—48 Cal. 256.

1064. When the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground of challenge to a juror. Such challenge must be made in the same form, and determined in the same manner, as if made to a juror.

Bias on summoning.—This section only allows a challenge of the panel, on account of such bias in the officer or person serving the venire, as is mentioned in § 1073—49 Cal. 178. Where the sheriff, acting, had formed and expressed an opinion that defendant was guilty, the challenge, on the ground of bias, ought to have been allowed—40 Cal. 502. See 10 Cal. 50.

1065. If, either upon an exception to the challenge or a denial of the facts, the challenge is allowed, the court

must discharge the jury so far as the trial in question is concerned. If it is disallowed, the court must direct the jury to be impaneled. [In effect April 9th, 1880.]

1066. Before a juror is called, the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so when the juror appears, and before he is sworn.

1067. A challenge to an individual juror is either—

1. Peremptory; or,
2. For cause.

Subd. 1. See 46 Cal. 122; 37 id. 678.

Subd. 2. See 37 Cal. 678.

1068. It must be taken when the juror appears, and before he is sworn to try the cause; but the court may for cause permit it to be taken after the juror is sworn, and before the jury is completed.

Challenge, when taken.—A peremptory challenge cannot be taken after a juror is sworn to try the issues, except for cause shown—46 Cal. 122; 37 id. 678; 10 id. 59. In a criminal action, twelve names must be drawn from the jury-box, and the defendant may examine each separately, and exhaust his challenges for cause before challenging any one peremptorily. If he should accept say six, and challenge six, those accepted must then be sworn, and six additional names must be drawn and presented for examination, with which the same process should be repeated, and so continued until the jury is complete—6 Pac. C. L. J. 882; 37 Cal. 678; 46 id. 122; 45 id. 323. If a party attempt to challenge for implied bias, and it being disallowed he then challenges peremptorily, if it does not appear affirmatively that he had exhausted his peremptory challenges at the time a full panel was sworn, he is not prejudiced by disallowance of the challenge—41 Cal. 430. See 20 Cal. 147.

1069. A peremptory challenge can be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court must exclude him.

Peremptory challenge, how taken.—A peremptory challenge cannot be allowed after the juror is sworn to try the issue, except for cause shown—46 Cal. 122; 37 id. 678. The right may be exercised after the twelve jurors are passed or taken, but before they are sworn to try the issue—4 Cal. 200; 16 id. 131. He may interpose his challenge at any time after appearance of the juror, till he is sworn in, and a rule of court, restricting him to a particular time, would be in conflict with the preceding section—24 Cal. 13; see 37 id. 690. The court, in the exercise of a sound discretion, may allow the prosecution to interpose a peremptory challenge after the juror has been accepted, and before he is sworn to try the cause—53 Cal. 577; and the court may, for cause, after the juror is sworn and before the jury is complete, permit per-

emptory challenges—24 id. 11. Without naming the juror, or stating facts coming to his knowledge, a demand or offer to challenge after the twelfth juror is accepted, but not sworn, may be properly refused—10 Cal. 59. The defendant may challenge peremptorily at any time after the name is drawn and before the juror is sworn to try the cause—47 Cal. 122; 24 id. 13; 10 id. 59; 4 id. 199. On due cause shown, the court, at any moment before the case is opened or the juror is sworn, will permit a peremptory challenge—49 Cal. 241; 51 Ala. 30; 5 Leigh, 708; 23 Pa. St. 12.

1070. If the offense charged be punishable with death, or with imprisonment in the State prison for life, the defendant is entitled to twenty and the State to ten peremptory challenges. On a trial for any other offense, the defendant is entitled to ten and the State to five peremptory challenges. [Approved March 30th, in effect July 1st, 1874.]

1071. A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either—

1. General—that the juror is disqualified from serving in any case; or,

2. Particular—that he is disqualified from serving in the action on trial.

1072. General causes of challenge are—

1. A conviction for felony.

2. A want of any of the qualifications prescribed by law to render a person a competent juror.

3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror.

1073. Particular causes of challenge are of two kinds:

1. For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this Code as implied bias.

2. For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which is known in this Code as actual bias. [Approved March 30th, in effect July 1st, 1874.]

Particular causes of challenge are of two kinds—49 Cal. 169.

Subd. 1. That he had formed and expressed an opinion as to the guilt of the prisoner, or has shown feelings of hostility to him, is a good ground of challenge—3 Wend. 314; see 49 Cal. 178.

Subd. 2. The mere formation of hypothetical opinions founded on hearsay or information would not support a challenge—45 Cal. 142; provided he had no feeling of malice or ill-will against defendant—43 Cal. 183. The challenge must be entered on the minutes, and application be made to have triers appointed—41 Cal. 39. See *post*, § 1078, note.

1074. A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages.

3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution.

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information.

5. Having served on a trial jury which has tried another person for the offense charged.

6. Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it.

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror. [In effect April 9th, 1880.]

Subd. 8. That he had formed or expressed an unqualified opinion is a sufficient ground—6 Cal. 228; 7 id. 140; 8 id. 361; 41 id. 642; 43 id. 531; 49 id. 184. The fact that the juror has a "fixed and positive opinion as to the question of defendant's guilt or innocence" does not constitute a cause of challenge for implied bias—49 Cal. 169. He is not disqualified if he has formed an opinion from what he has heard, which it would require evidence to remove, if it is not unqualified, and he is willing to give accused a fair trial—48 Cal. 296; 22 id. 351; 17 id. 146; nor is he disqualified, because he is unable when questioned to define the word "qualified"—id. Where he had expressed his unqualified opinion, he is in judgment of law incompetent—41 Cal. 642; 6 id. 207; 8 id. 259; 16 id. 132; but that he had formed an opinion from what he had read and heard is not sufficient ground of challenge—18 id. 184. There is a wide difference between a "fixed" opinion, formed after hearing the facts, and a mere impression or hypothetical opinion—48 Cal. 79; 16 id. 132; 45 id. 142; see 5 id. 347.

Subd. 9. See 2 Cal. 259; 24 id. 17; 13 Wend. 351. That he would not convict on circumstantial evidence is a good ground of challenge—54 Cal. 401.

1075. An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

Where a person whose name is on the poll-tax list only is sworn to try the cause, and defendant receives him as a juror without objection, he cannot, after verdict, raise the objection to his competency—43 Cal. 31; 6 id. 405. A party who accepts a juror knowing him to be disqualified, is estopped from afterward availing himself of such disqualification—6 Cal. 411. The right of exemption of a juror is not a ground for challenge—6 Cal. 98. A privilege of a juror cannot be technically regarded as a ground of challenge, as old age—19 Ill. 74; 11 Tex. 257; deafness or other infirmity—20 Ga. 156; see Law R. 3; H. L. Cas. 306; or, holding excusatory positions—51 Me. 395. The excusing of a juror for such reasons is within the discretion of the court—8 Ala. 302; 20 Ga. 156.

1076. In a challenge for implied bias, one or more of the causes stated in section one thousand and seventy-four must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of section one thousand and seventy-three must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety; provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered in the minutes of the court or of the

phonographic reporter. [Approved March 30th, in effect July 1st, 1874.]

Challenge for implied bias.—The challenge for implied bias must refer to the particular subdivision of § 1074; to say he challenges the juror for implied bias is not sufficient—49 Cal. 169; id. 178; id. 166; id. 241; 41 id. 430; id. 37; 37 id. 277; id. 258; 16 id. 130; 43 id. 448; 16 id. 130; 20 id. 147.

1077. The adverse party may except to the challenge in the same manner as to a challenge to the panel, and the same proceedings must be had thereon as are prescribed in section one thousand and sixty-one, except that if the exception be allowed, the juror must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge.

See *ante*, §§ 1068, 1073, 1076.

1078. If the facts are denied, the challenge must be tried by the court. [Approved March 30th, in effect July 1st, 1874.]

If a challenge is interposed, and the opposite party demurs to its sufficiency, an issue is raised, and the juror can be further examined, other witnesses called, and the matter then submitted to the court—16 Cal. 131. But the disqualification must be urged at the proper time—6 Cal. 405. The competency of a juror is determined by the court from his trial—29 Cal. 635.

Subd. 2. A challenge for "actual bias" must state against whom, and if against defendant, it must be so stated—37 Cal. 279.

Competency of juror.—The law contemplates that every juror who sits in a cause shall have a mind free from all bias or prejudice of any kind—5 Cal. 349. The burden of proof of incompetency is on the party asserting it—47 Cal. 396. The inquiry should not be limited to the isolated question of a fixed and absolute opinion—1 Denio, 307; 3 id. 124. Evidence tending to show bias is admissible—13 Fla. 675; 2 Parker Cr. R. 16; 1 Denio, 281. A general impression of defendant being a bad man, from reading, etc., is not a disqualification—16 Cal. 180; 24 id. 17. Being a policeman, and having a general bad opinion of people charged with crime, is no valid objection, if otherwise he is competent—16 Cal. 128. The mere hearing or reading about a case, and even a statement of the facts, does not disqualify—16 Cal. 128. Hearing the purported facts rumored, but conversing with none of the witnesses, and from this forming an opinion, does not disqualify—17 Cal. 142. It is not sufficient to set aside a juror, that he has formed an unfavorable opinion of the accused—2 Barb. 216; see 3 Denio, 121. That any opinion he has can be changed by evidence, and an expressed willingness to be governed by the evidence, constitutes a good juror, if otherwise qualified—1 Cal. 379. But if a proposed juror has said, "The people ought to take the prisoner out of jail and hang him," it would be error to allow him to sit on the jury—9 Cal. 298; but see 43 id. 139. Fixed conclusions to disqualify must amount to settled convictions, or they must have been expressed—1 Denio, 308; 27 Cal. 512; see 16 id. 130; 17 id. 142; 18 id. 180.

1079, 1080 of said Code are repealed. [Approved March 30th, in effect July 1st, 1874.]

Triers.—Objection to the appointment of triers must be made at the time, and the grounds of objection, if overruled, be reserved by exceptions—43 Cal. 167. When triers are not asked for, the parties are bound by the decision of the court—13 Ark. 720; 1 Mann. (Mich.) 451; 4 Wend. 229; 21 id. 509. The trial should be conducted in the presence of the court—19 Ga. 102.

1081. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry.

Juror as witness.—A Chinese defendant has a right to ask a proposed juror whether he would as readily believe Chinese testimony as that of white men—6 Pac. C. L. J. 886; id. 880.

1082. Other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues govern the admission or exclusion of evidence on the trial of the challenge.

1083. The court must allow or disallow the challenge, and its decision must be entered in the minutes of the court. [Approved March 30th, in effect July 1st, 1874.]

Determination of challenge.—The action of the court in allowing a challenge for implied bias is not the subject of an exception—51 Cal. 496; 49 id. 679; as distinguished from disallowing the challenge—45 id. 144. The Supreme Court will not overrule the action of the lower court in denying a challenge, unless it is apparent that it abused its discretion—47 Cal. 396. When the court overrules a challenge, and the prisoner excepts, the exception is to the decision overruling the challenge—41 Cal. 39. The decision of the question of fact raised by the challenge is final, and not subject to review on appeal—49 Cal. 166. Where doubts, more or less grave, as to the actual state of mind of the juror, still remain, the challenge for implied bias should be allowed—43 Cal. 331. See *ante*, § 1076; and *post*, § 1170.

1084, 1085 of said Code are repealed. [Approved March 30th, in effect July 1st, 1874.]

See 49 Cal. 169; and *ante*, §§ 1074-1076.

1086. All challenges to an individual juror, except peremptory, must be taken, first by the defendant, and then by the people, and each party must exhaust all his challenges before the other begins.

1087. The challenges of either party for cause need not all be taken at once, but they must be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. To the panel.
2. To an individual juror, for a general disqualification.
3. To an individual juror, for an implied bias.
4. To an individual juror, for an actual bias.

See 37 Cal. 676; 45 id. 323.

1088. If all challenges on both sides are disallowed, either party, first the people and then the defendant, may take a peremptory challenge, unless the parties' peremptory challenges are exhausted.

If the prosecution passes the juror to the defendant, who declines to challenge, the prosecution may then interpose a peremptory challenge to a juror before he is sworn in—48 Cal. 559. See 37 Cal. 676.

CHAPTER II.

THE TRIAL.

- § 1093. Order of trial.
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- § 1095. Number of counsel who may argue the case.
- § 1096. Defendant presumed innocent. Reasonable doubt.
- § 1097. Reasonable doubt as to degree convicts only of lowest.
- § 1098. Separate trials.
- § 1099. Discharging defendant that he may be a witness.
- § 1100. Same.
- § 1101. Effect of such discharge.
- § 1102. Rules of evidence in civil applicable to criminal cases.
- § 1103. Evidence on trial for treason.
- § 1104. Evidence on trial for conspiracy.
- § 1105. When burden of proof shifts in trials for murder.
- § 1106. Evidence on a trial for bigamy.
- § 1107. Evidence upon a trial for forging bank-bills, etc.
- § 1108. Evidence upon trial for abortion and seduction.
- § 1109. Evidence on a trial for selling, etc., lottery tickets.
- § 1110. Evidence of false pretenses.
- § 1111. Conviction on testimony of accomplice.
- § 1112. Proceedings, if evidence show higher offense than charged.
[Repealed.]
- § 1113. Discharge jury for lack of jurisdiction, etc.
- § 1114. Proceedings, if jury discharged for want of jurisdiction of offense committed out of the State.
- § 1115. Proceedings in such case, when offense committed in the State.
- § 1116. Same.
- § 1117. Proceedings, if jury discharged because the facts do not constitute an offense.
- § 1118. When evidence on either side is closed, court may advise jury to acquit.
- § 1119. View of premises, when ordered, and how conducted.
- § 1120. Knowledge of juror to be declared in court, and he to be sworn as a witness.
- § 1121. Jurors, separation of, during trial.
- § 1122. Jury, at each adjournment, must be admonished, etc.
- § 1123. Juror unable to perform his duties, proceedings.

- § 1124. Court to decide questions of law arising during trial.
- § 1125. On indictment for libel, jury to determine law and fact.
- § 1126. In all other cases court to decide questions of law.
- § 1127. Charging the jury.
- § 1128. Jury may decide in court, or retire in custody of officers.
- § 1129. Defendant appearing for trial may be committed.
- § 1130. If district attorney fails to attend, court may appoint.

1093. The jury having been impaneled and sworn, the trial must proceed in the following order, unless otherwise directed by the court:

1. If the indictment or information be for felony, the clerk must read it, and state the plea of the defendant to the jury, and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction. In all other cases this formality may be dispensed with

2. The district attorney, or other counsel for the people, must open the cause and offer the evidence in support of the charge.

3. The defendant or his counsel may then open the defense, and offer his evidence in support thereof.

4. The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the court and jury; the district attorney, or other counsel for the people, opening the argument, and having the right to close.

6. The judge may then charge the jury, and must do so on any points pertinent to the issue, if requested by either party; and he may state the testimony and declare the law. If the charge be not given in writing, it must be taken down by the phonographic reporter. [In effect April 9th, 1880.]

Order of trial.—An order excluding such of the jurors as were not impaneled to try the case is not a deprivation of the right of public trial—53 Cal. 494. Persons accused of crimes alleged to have been committed before the Penal Code took effect are to be tried in accordance with the forms of procedure provided in the Code—46 Cal. 117. Though the requirements of the Code should appear wholly immaterial, a failure to comply with them may be grounds for a new trial—15 Cal. 476.

Subd. 1. The failure of the clerk to read the indictment is not a fatal error where it appears that the jury were fully informed of the precise charge—53 Cal. 494.

Subd. 2. The opening of the case by the prosecution is a simple statement of the theory of the case without argument or elaboration, and the introduction of proofs necessary to support the indictment—43 Cal. 349.

Subd. 3. The court may exclude from the court-room all witnesses except the one under examination—53 Cal. 491. In general, the court will on the application of either of the parties direct that all witnesses but the one under examination shall leave the court—53 Cal. 493; 1 Wheel. C. C. 123; see *ante*, § 867; and at any period of the case—1 Wheel. C. C. 123. It is in the sound discretion of the court—29 Cal. 622. Should a witness be present in disobedience to the order excluding him, he is in contempt, but it is no ground for rejecting his testimony—20 Cal. 436; 3 W. Va. 705. See note to *subd. 2.* See EVIDENCE, *post*, § 1102, and note.

Rights of prosecution.—The prosecution cannot be compelled to introduce particular witnesses—32 Cal. 60.

Rights of defendant.—A defendant ought not to be deprived of the personal presence of a witness which may be had at the trial—23 Cal. 445. In criminal prosecutions the accused shall have the process of the court to compel the attendance of witnesses in his behalf. See Const. Cal. art. 1, § 13. Defendant as witness—see *ante*, p. 18. Defendant is not entitled to a bill of particulars of the evidence relied on to sustain the indictment—55 Cal. 236; but see *contra*, under the practice in other States—11 Pick. 432; 1 Gray, 436; 2 id. 434; 4 id. 11; 15 Pick. 122; 41 Vt. 526; 11 R. I. 314; 107 Mass. 323.

Rights of witnesses.—Witnesses shall not be unreasonably detained nor confined in any room where criminals are actually imprisoned—Const. Cal. art. 1, § 6.

Subd. 4. Where defendant is surprised at the exclusion of evidence relied on to establish his point, he may apply for leave to introduce other testimony—17 Cal. 400. The defendant is as much bound to produce testimony to rebut the testimony which tends to prove his guilt as any other testimony of the prosecution—28 Cal. 428. See *post*, § 1102, notes.

Subd. 5. In cases tried since the Penal Code took effect, the district attorney must open and may conclude the argument—46 Cal. 117; changing the rule as prescribed in the amendatory statute of 1854—see 43 id. 155. That the prosecution must open and may conclude the argument, does not change the rule prescribed in § 1094, that accused may be heard by two counsel—43 Cal. 154. When other counsel are associated with the district attorney, the court may, in its discretion, for good reason, allow the associate counsel to conclude—47 Cal. 105; 46 id. 303; and the presumption is that the court had good reason for allowing him to conclude—*id.* Under the old rule, it was competent for the court to require the counsel for defendant to open and the counsel for the prosecution to close the argument, without stating any reason for the ruling—44 Cal. 100; 43 id. 156; but see 46 id. 117. It is irregular for the prosecution, against the objection of defendant's counsel, to comment on the refusal of defendant to be cross-examined

as to the whole case—41 Cal. 430; 36 id. 522. The counsel for the prisoner is not entitled to make his argument when the prosecution closes; it is to be made when the evidence is concluded—43 Cal. 349. Courts may limit counsel to a proper and reasonable consumption of time in presenting cases to juries, but this discretion in capital cases should be carefully exercised, and only under extraordinary circumstances—13 Cal. 581. The limitation must in no case deprive a defendant of his opportunity to make a full defense—13 Cal. 581. As a general rule, reading law to a jury is objectionable, but there are cases in which it may be allowed, by way of illustration, subject to the instructions of the court—44 Cal. 70.

Subd. 8. Charge of court.—A written charge may be waived by the defendant—45 Cal. 652; but the court cannot deliver an oral charge without defendant's consent—43 id. 384; id. 29; but with his consent, or the mutual consent of the parties, it may—43 id. 29; id. 384. The entry in the minutes of the court, that "the court charge the jury orally, a written charge being expressly waived," must be construed as a mutual consent—43 Cal. 384. A defendant is entitled to stand on his rights, and need not except to the charge at the time it is given—12 Cal. 345; and his consent cannot be presumed from his failure to object—43 id. 29; 44 id. 186. See *post*, § 1127, and note. It is irregular for counsel against the objection of defendant to comment, in his argument, upon the refusal of defendant to be cross-examined to the whole case, and for the court to permit such comments—41 Cal. 430; 36 id. 522.

Reading a deposition to the jury in the absence of the defendant, either before or after retiring, is error for which a new trial will be granted—5 Cal. 72. See *post*, § 1345.

The Constitution does not prohibit judges from determining and charging a jury whether there is any evidence with regard to an issue, or tending to sustain a fact on which a judgment may depend—49 Cal. 180. So, where there was no evidence to prove the killing manslaughter or excusable homicide, it is not error to charge that if it was willful, intentional, deliberate, and premeditated, it is murder in the first degree, otherwise not—49 Cal. 180. The judge may "state the testimony" to the jury—17 Cal. 169; Const. Cal. art. vi, § 19, *ante*, p. 21; but he cannot state the effect of the testimony—16 Cal. 133. It is for the jury to determine whether the evidence amounted to proof of the fact—30 Cal. 153; 16 id. 98; id. 138; 17 id. 169; 14 id. 438. If the charge appears on the record, and the record shows nothing to the contrary, the presumption is that it was fairly taken down by the reporter, according to the provisions of the Code—45 Cal. 652. See *post*, § 1127.

Evidence may be such as to justify the court in charging that if the jury believe defendant killed deceased, and that before doing so he declared it to be his intent to kill, the killing was done with express malice and deliberation—45 Cal. 322.

The charge given by the court on its own motion is no part of the judgment roll, and cannot be reviewed on appeal from the judgment—44 Cal. 598. If the court refuses a charge once clearly given, it should distinctly inform the jury that this is the reason for the refusal—8 Cal. 890; 13 id. 172; 17 id. 142.

Instructions.—An instruction should be based on evidence—43 Cal. 351; 6 id. 217; 51 id. 498; 24 id. 28; 30 id. 207; 15 id. 482; 1 id. 335; 47 id. 56. An instruction which goes to the acquittal of the defendant, must be broad enough to cover the essential facts in the case—55 Cal. 163. An instruction which ignores the possible guilt of the defendant as a present aider and abettor of the killing, should not be given—43 Cal. 64. The court may strike out a clause from the instruction, which is irrelevant, and not connected with the remainder—49 Cal. 169. See *post*, § 1176. If an instruction is not sufficiently explicit as to the prepos-

ance of evidence, defendant should ask the court to make it more explicit—49 Cal. 650. An instruction that there was a conspiracy, and that defendant was murdered in pursuance of the conspiracy, and that the verdict should be guilty, is not erroneous—49 Cal. 650. See *post*, § 1127.

1094. When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in the last section may be departed from.

It is within the discretion of the court to depart from the order prescribed in the preceding section as to arguments of counsel—43 Cal. 155. It is competent for the court to require the counsel for the defendant to open, and the counsel for the prosecution to close—44 Cal. 100. Where nothing to the contrary appears on the record, the presumption is that the court had good reason for allowing associate counsel to conclude the argument before the jury—46 Cal. 303; see 47 *id.* 106; 43 *id.* 155.

1095. If the indictment or information be for an offense punishable with death, two counsel on each side may argue the cause to the jury. If it be for any other offense, the court may, in its discretion, restrict the argument to one counsel on each side. [In effect April 9th, 1880.]

In a capital case, the court may allow more than two counsel to address the jury on each side—48 Cal. 236; see 43 Cal. 153. See Const. Prov. *ante*, page 17. See *ante*, § 1093, subd. 5, note. The order of argument is subject to the discretion of the court—see *ante*, § 1094, and note; and see 55 Cal. 298.

1096. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

Burden of proof.—In criminal cases, the prosecution is required to prove two things; first, that the crime has been committed; and second, that it was committed by the person charged, and by none other—31 Cal. 567; see 24 Pick. 366; 28 Ala. 693; McCahon, 134; 6 Mo. 455. Without some evidence tending to show that a crime has been committed, the question as to the person by whom committed cannot arise—31 Cal. 567. That a crime has been committed, cannot be proved by the extra-judicial confessions or statements of the prisoner alone—31 Cal. 568; 33 Miss. 352. There must be some corroborating circumstances tending to show that a crime has been committed—31 Cal. 568; 32 *id.* 81; see 15 Wend. 148; 26 Miss. 157; 32 *id.* 450; 16 Wend. 53; 28 Mo. 219. Where there is an entire want of evidence of the *corpus delicti*, except statements made by the prisoner, the court should direct the jury to acquit—31 Cal. 568. The evidence must be confined to the crime charged—35 Cal. 570; 36 *id.* 526; 32 *id.* 81. Guilty knowledge is an essential circumstance to prove—16 Cal. 98; but immaterial averments, which may be rejected as surplusage, need not be proved—31 N. H. 521; 7 Iowa, 255. Burden of proof, when shifts—see *post*, § 1105.

The hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the exclusion of any rational probability of any other hypothesis being true, or the jury must find the defendant not guilty—42 Cal. 535; 30 Id. 154; 32 Id. 435; 118 Mass. 1. It is not required that inculpatory facts be absolutely incompatible with the innocence of the accused—41 Cal. 66. A mere preponderance of evidence is not sufficient—51 Cal. 373; 47 Id. 97; 41 Id. 66. On the other hand, it is not necessary that inculpatory facts be absolutely incompatible with the innocence of the accused—41 Cal. 66. Where independent facts and circumstances are relied on, in case of circumstantial evidence, each essential independent fact in the chain or series of facts, must be established to a moral certainty, beyond reasonable doubt, and to the entire satisfaction of the jury—54 Cal. 399; 39 Id. 326; 27 Ala. 20; 23 Id. 20. It ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion—41 Cal. 66; 4 Parker Cr. R. 396; 19 N. Y. 549; 49 Id. 137; 41 Tex. 209; 1d. 342; 46 Ga. 637; 25 Miss. 584; 5 Blackf. 579; 2 Blatchf. 207; 5 Id. 579.

If a juror goes into the trial with his mind unprejudiced, knowing nothing of the facts, and becomes satisfied without doubt from the testimony that the prisoner is guilty, there can be no reasonable doubt in his mind—37 Conn. 355.

As against the defendant, the facts must be proved beyond a reasonable doubt—5 Cal. 129; while on the part of the defendant, preponderating proof is sufficient to establish a fact—5 Cal. 129; 6 Id. 410; 24 Id. 236; see 49 Cal. 14. Presumption—see *post*, § 1102, note.

Province of jury.—It is the peculiar province of the jury to draw the conclusions from the evidence, in which they are not to be interfered with, nor prohibited, nor aided by the court—see 17 Cal. 377; 27 Id. 507; 30 Id. 214; 1d. 151; 31 Id. 409; 32 Id. 213; so, it is their province to find malice—6 Id. 214; and the identity of property—32 Id. 60; 23 Id. 150. The circumstances producing the conclusions, but not the impressions themselves, are the subjects of proof—8 Cal. 390; and error, in permitting certain improper evidence to go to the jury, may be cured by striking it out, and instructing the jury in regard to it—34 Id. 176.

Reasonable doubt is that state which, after entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge—47 Cal. 97; 44 Id. 290; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it—44 Cal. 290.

The jury must be satisfied beyond a reasonable doubt that every fact essential to constitute the offense has been proved—53 Cal. 67; 47 Id. 406; 5 Id. 127; 6 Id. 217; 1d. 410; 6 N. Y. Supreme, 369; 45 Ala. 66; 27 Id. 20. They must be satisfied beyond a reasonable doubt that defendant and no other person committed the crime—52 Cal. 446; 39 Id. 326; 42 Id. 535. They cannot convict merely because they believe the evidence is such that a man of prudence would act upon it in his own affairs of greater importance—51 Cal. 373; see 3 Nev. 409; 10 Minn. 407; 18 Id. 208; 31 Ind. 492. No conviction should be had, unless the jury are entirely satisfied, from the evidence, that the defendant is guilty—39 Cal. 326.

Where two persons at the same time fire at another, and there is no evidence of conspiracy, and the jury are in doubt as to to which killed, the one on trial is entitled to the benefit of the doubt—45 Cal. 290; but otherwise if there is proof of a conspiracy—1d.

If the whole testimony, taken together, leaves no room for a reasonable doubt on the point of venue, the venue is sufficiently proved—48 Cal. 338.

1097. When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only.

See *ante*, § 1016, note.

Instances of conviction of lower offense—4 Cal. 376; 5 id. 278; 6 id. 543; 17 id. 332; 35 id. 391. See *ante*, § 1016, note 3.

1098. When two or more defendants are jointly charged with a felony, any defendant requiring it must be tried separately. In other cases the defendants jointly charged may be tried separately or jointly in the discretion of the court. [In effect April 9th, 1880.]

Separate trials.—A defendant in a joint indictment has a right to demand a separate trial, or to waive the right—8 Cal. 303; see 5 id. 184. Where defendants waived separate trials, but before the jury was sworn moved for separate trials, it was in the discretion of the court to refuse the application—55 Cal. 230. On electing to be so tried, and being tried, one may be a witness for the other—5 Cal. 134; 20 id. 440; 2 Humph. 99; 6 Mo. 1; 1 Ga. 610; 4 Wash. C. C. 428.

1099. When two or more persons are included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the people. [In effect April 9th, 1880.]

Discharge.—The discharge must be at the trial, before defendant has gone into his defense, by the court of its own motion, or on application of the district attorney—48 Cal. 253. A defendant cannot be discharged from the indictment without trial except in the cases provided by statute—id. One indicted as an accessory is a competent witness for the people in the trial of the principal—44 Cal. 539. An instruction by the court to such witness that his evidence cannot be used against himself, does not prejudice defendant—id. The discharge of one defendant jointly indicted, to make him a witness for the people, is in effect an acquittal—24 Cal. 48. A promise by the prosecuting attorney or the committing magistrate of immunity from punishment furnishes no ground for a discharge of the prisoner when on trial—48 Cal. 252.

1100. When two or more persons are included in the same indictment or information, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his codefendant. [In effect April 9th, 1880.]

When joint defendants are separately tried, each may be a witness for the other—5 Cal. 184; 20 *id.* 440; 2 *Humph.* 99; 6 *Mo.* 1; 1 *Ga.* 610; 4 *Wash. C. C.* 428.

1101. The order mentioned in the last two sections is an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense.

Discharge from indictment—an acquittal—24 *Cal.* 46; see 48 *id.* 253.

1102. The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code.

Name of defendant.—It may be proved that defendant was known by the name mentioned in the indictment, and also by another name—46 *Ga.* 269. Where a person indicted by his initials, the fact whether he is so known may be put in issue, and if so proved against him he may be convicted—49 *Ala.* 311. The initial of a middle letter of a name is no part of the name, hence a variance is immaterial—39 *Ill.* 457; but where the first name was an initial, and the second name was in full, by which appellation he was generally known, the indictment is not sustained by proof that he usually signed both christian names by initials—12 *Ohio St.* 427. Whether a person is as well known by one name as another is a question of reputation, custom, and usage—11 *Gray*, 320; see 54 *Me.* 563.

Upon the issue as to the name of the defendant, the fact that to a former indictment by the same name, she answered on her arraignment, is proper for consideration of the jury—40 *Me.* 438. If there is a variance in the sound of the name as spelled in the indictment, and proved at the trial, defendant ought to be acquitted—6 *Parker Cr. R.* 31; but where the difference is scarcely perceptible the variance is immaterial—37 *Ala.* 106; 16 *Gray*, 1; 58 *Ill.* 160; 8 *C. 1 Green C. R.* 704. The question of *idem sonans* is for the jury and not for the court—20 *Gratt.* 825; but where defendant omits to submit it to the jury as a question of fact, he waives the right to insist on the objection—14 *Gray*, 400; see 25 *Tex.* 574.

Where identity is an important question, witness may be asked where his acquaintance was, and what was his own business—55 *Me.* 200. An answer made to the clerk of the court demanding his name is part of the testimony—49 *Cal.* 333. If the name of the person injured is alleged as unknown, the proof must correspond with the allegation, and if there be no proof, defendant cannot be convicted—30 *Ind.* 115; but see 30 *Conn.* 500.

Intent.—Intent may be proved directly or by any circumstances tending to establish it—27 *Cal.* 572. Where it is proved that a crime has been committed, and the circumstances point to the accused, facts tending to show a motive, though remote, are admissible—17 *Ala.* 431. Where motive is material it cannot be imagined, but facts from which it is inferred must be proved—49 *N. Y.* 137; proof of a previous personal difficulty is proper for consideration on the question of motive—4 *Parker Cr. R.* 380. Separate and distinct felonies may be proved to establish the existence of a motive to commit the crime in question—4 *Ark.* 56; 41 *Ala.* 405; 3 *Ill.* 53; 3 *Parker Cr. R.* 681; 4 *Id.* 71; see 3 *La.* An. 512. Where the character of an act depends upon the intention with which it was done, the ignorance of the person doing it may be considered on the question of his guilt—27 *Tex.* 705. It is for the jury to determine the question of intent—53 *Cal.* 415. Every sane person is presumed to intend the consequences of his own act, and an un-

lawful act done, is done with an unlawful intent—55 Cal. 201; 65 Me. 30; 5 Barb. 203; 2 Dev. 269; 11 Ga. 615; 2 Gratt. 594; 13 N. J. L. 361; 2 Halst. 220; 8 Ind. 290; 40 Id. 263; 56 Id. 263; 5 Ired. 350; 18 Johns. 115; 2 How. (Miss.) 656; 4 Mass. 391; 50 Id. 103; Id. 410; 32 Id. 337; 7 N. Y. 385; 13 Wend. 87; 60 Ala. 445; 91 Ill. 143. Intent to maim or disfigure may be presumed from circumstances, and it is not necessary to prove antecedent grudges, threatenings, or an express design—1 Hayw. 130. Where one is purposely shot under the mistaken belief that he is a different person, intent will be presumed—18 Cal. 636; 21 Ohio St. 306; 7 Ga. 2; 11 Humph. 159; Wright, 20; 59 Mass. 306; 2 Strob. 77. Intent may be inferred from facts and circumstances—see Desty's Crim. Law, § 6 a.

Locus delicti.—The prosecution must prove the offense committed in the county charged in the indictment—48 Cal. 382; 44 Id. 105. Where the venue is laid in the county to which the stolen property has been brought, it is competent for the prosecution to prove that the property was stolen in another county—40 Cal. 648. The estimate of a witness who had been on the ground without actually having measured the distance, is admissible to prove whether the place of killing was within five hundred yards of the county line—55 Cal. 230. Where the evidence tended to show the offense committed within a certain saloon, but nothing in the record tending to show that the saloon was in the county, there was a failure to prove the *locus delicti*—44 Cal. 105.

Judicial notice will be taken of the territorial extent of jurisdiction and sovereignty of their own *de facto* government and its subdivisions—1 Cal. 13; 39 Id. 40; 3 Dall. 297; 7 Peters, 341.

Alibi.—An *alibi* is a fact, and its existence is established by the same evidence as any other fact—47 Ala. 659. It need not be established beyond a reasonable doubt—7 Cold. 92; 12 Ind. 670; 39 Ill. 457; 42 Ind. 373; 46 Id. 311; but see 74 Pa. St. 463. If the evidence is sufficient to raise a reasonable doubt, it should be considered, although the *alibi* does not cover the entire time—49 Ind. 248; as the proof of an *alibi* need not be exact as to time—8 Bush, 366. Where the offense is shown to have been committed during the night or part of the night, the evidence of the *alibi* ought to cover the whole of such time—48 Ind. 483. Where the prisoner undertakes to prove an *alibi*, the prosecution in reply may disprove it—4 Gray, 39; see 37 N. H. 196. The mere unsuccessful attempt to establish an *alibi* is entitled to no greater weight against the prisoner than the failure to prove any other item of defense—31 Ind. 262; 20 Ill. 85; 39 Id. 457; 16 Ohio St. 583; see 64 N. C. 56.

Presumptive evidence.—After indictment found, the accused is presumed to be guilty for most purposes, except that of a fair and impartial trial before a jury—2 Dev. 421; 4 Parker Cr. R. 654. Capacity for crime of persons above seven years, is a question of fact—41 Vt. 585. A wife will be presumed to have acted under coercion of her husband, when he was at the time near enough to be under his immediate influence and control—112 Mass. 287. The question of compulsion is to be determined by the jury—6 Parker Cr. R. 9. Evidence that parties cohabited together as husband and wife is competent to prove marriage, except in cases where marriage is the foundation of the crime to be punished—26 Cal. 129.

Malice is presumed from an assault with an instrument likely to produce death, in the absence of proof to the contrary—19 Iowa, 447. Malice may be implied from circumstances—5 Sawy. 620; 14 Bush, 601; Id. 382; 5 Tex. Ct. App. 165; but express malice is never to be inferred from the act or the weapon used—37 Ind. 432; 25 Ala. 15; 5 Tex. Ct. App. 339; Id. 365.

False statements or falsification of the record afford a presumption of guilt—Deady, 524. Proof that a grocer sold liquor, and that it was drunk on the premises, is presumptive evidence that it was with his

consent—6 Miss. 646. The existence of a fact does not raise a reasonable presumption of the existence of another fact—51 Cal. 588; 52 Id. 315.

No inference of guilt can be drawn from the prisoner declining to testify in his own behalf—36 Cal. 522; 39 Id. 704; 40 Vt. 555; see 15 Mich. 403; *contra*, 55 Me. 200; 57 Id. 574; 59 Id. 298; but where the prisoner, when testifying in his own behalf, fails to explain a material fact or circumstance, the same presumption arises as from such failure by another witness, if in his power to give it—56 N. Y. 315.

Where accused is so situated that he could explain the circumstantial evidence against him if innocent, and he fails to do so, it will be presumed that the proof, if produced by him, instead of rebutting, would tend to sustain the charge—5 Cush. 295.

The omission of a party to produce evidence showing where he was on a certain day, or how he became possessed of a given sum of money, or other property, is not conclusive against him, though it creates a strong presumption of guilt; it is a question for the jury—33 N. Y. 501; 48 Barb. 466. The omission of a party to make his son a witness for him, when he could have probably explained some of the facts bearing against him, is a proper subject for the consideration of the jury—14 Gray, 367.

Recent possession.—Recent possession of stolen property is not *prima facie* evidence that the possessor is guilty—23 Cal. 51; but see *contra*, that possession of property recently stolen, unaccounted for or unexplained, is presumptive evidence of guilt—9 Conn. 527; 1 Mass. 6; 2 Ind. 967; 8 Jones, (N. C.) 413; 65 N. C. 593; 12 Kan. 550; 50 Iowa, 135; 49 Id. 48; 24 Ga. 31; 1 Greene, (Iowa) 106; 25 Iowa, 273; 27 Id. 18; 114 Mass. 299; 20 Iowa, 413; 41 Id. 217; 72 N. C. 482; 12 Ill. 239; 33 Tex. 480; 21 Gratt. 864; 42 Miss. 650; 43 N. Y. 179; 30 Miss. 654; 36 Id. 120; 55 Id. 407; 52 Id. 695; 37 Mo. 465; 51 Vt. 287; 13 Cox C. C. 275; 52 Ala. 379. It is not of itself sufficient to convict—55 Cal. 236; 51 Id. 588; 49 Id. 58; 48 Id. 123; 27 Id. 407; 20 Id. 178; 13 Id. 332; 16 Id. 88; 6 Pac. C. 1. J. 931; 44 Tex. 480. It is not *prima facie* evidence of burglary—49 Cal. 57; 45 Iowa, 11. It is a circumstance to be considered with other circumstances—55 Cal. 236; 49 Id. 581; 45 Id. 285; 44 Id. 533; 18 Id. 382; 20 Id. 177; 92 Ill. 647; 50 N. H. 510; 55 Ill. 204; 12 Minn. 293; 37 Tex. 202; 3 Jones, (N. C.) 194; 4 Id. 440; 20 Iowa, 413; 56 N. Y. 315; 6 Cox C. C. 45; 58 Ind. 340; S. C. 2 Am. Cr. R. 372; 12 Kan. 550; S. C. 1 Am. Cr. R. 351. It must be accompanied by proof of other circumstances to render it available to conviction—48 Cal. 123; 44 Id. 541; 6 Cold. 9; 27 Iowa, 18; 38 Mo. 372; 19 Me. 398; 15 Mo. 349; 46 Ind. 447; 42 Id. 490; 2 Id. 91; 41 Tex. 289; S. C. 1 Am. Cr. R. 437; 13 Cox C. C. 275. As where part of the stolen property was found concealed, and the rest of it in possession of defendant—47 Cal. 105; or where the money was of a kind rarely seen, and consists of a combination of pieces—49 Id. 583; 39 Id. 614; and an instruction that possession is only a "guilty circumstance" is not erroneous—44 Id. 541. If the evidence in explanation creates a reasonable doubt, it practically rebuts the presumption—58 Ind. 340; S. C. 2 Am. Cr. R. 372; 33 Ind. 412; 35 Id. 409. The question is one of fact for the jury—3 Brev. 514; 3 Dev. & B. 122; 11 Met. 534; 2 Ind. 11; 37 Tex. 203; S. C. 1 Am. Cr. R. 434; 7 Car. & P. 551; 3 Id. 600; 6 Jur. 28; 1 Leigh & C. 427. Possession of bank-notes similar to those stolen, with contradictory accounts of the manner in which he came by them, are evidence to show he did not come by them honestly—4 Dr. 606. Presumption of guilt from the possession of stolen property is not increased because good character is not shown—23 Cal. 51.

Admissions.—What the prisoner said at any time after commission of the offense is competent evidence against him—65 Barb. 48. So an admission of fact made at the trial in open court may be considered by the jury—25 Cal. 531. The admission of a fact made by defendant's counsel in his presence, and not objected to by him, is presumed to be

with his consent, and may be read in evidence against him—25 Cal. 531. An admission by the prosecuting attorney is binding on the people, and is proper for the consideration of the jury—34 Cal. 551. Admissions and confessions may be implied from the acquiescence of defendant in the statement of others made in his presence—32 Cal. 98; 62 Mo. 129; see 5 Met. 536; 39 Ala. 523; 32 id. 560. The admissions and declarations of the prisoner may be proved without first showing that no promise or threat was held out to induce him to make them—13 Fla. 636. Telegraphic messages in the handwriting of defendant are competent evidence as admissions made by him—Allen, 543. They are to be considered for all purposes to which they are relevant—36 Cal. 522.

Evidence of admissions and declarations must be confined to the subject-matter of the inquiry—11 Gray, 323; yet the jury are not bound to give equal credit to all parts of the statement—32 Vt. 241; see 56 N. Y. 95; 55 Barb. 651; 42 N. Y. 270.

Acts and declarations as evidence.—Previous acts and declarations of the prisoner are admissible in connection with the *res gestæ* where it is necessary to prove a corrupt intent—36 N. Y. 431. Declarations which are voluntarily and spontaneously made, springing out of the transaction and tending to explain it, are admissible as part of the *res gestæ*—35 Cal. 49. Conduct of defendant tending to show an admission of guilt, is competent evidence—41 Ala. 393. The conduct, demeanor, and expressions of the accused at or about the time of the offense, are for the consideration of the jury—49 Ala. 381; 5 Humph. 333. Threats made against the parties engaged in the prosecution are admissible to show the character of the defense—19 Iowa, 154. The declarations and statements made by defendant *after* being charged with the crime, to be admissible they must be shown to have been voluntary—15 N. Y. 384; 57 Barb. 353; 42 N. Y. 200; see 41 N. Y. 7.

The declarations of the prisoner cannot be proved for the purpose of drawing out the reply of the witness to whom they were made, unless they form part of the conversation put in evidence—23 Ala. 44; Where the declarations of the prisoner are proved, the jury ought to take the whole in consideration, yet they may reject those in his favor, and believe those against him—21 Cal. 261; 13 Mo. 382; 23 Ohio St. 146; 10 Mich. 212. The prosecution, in proving the declarations of the prisoner, is not bound by them. They are taken in connection with all the other evidence—27 N. Y. 336.

Declarations of defendant in his own behalf, as a general rule, are not admissible—9 Ired. 440; 1 Woods, 581. To be admissible, they must have occurred within the period covered by the criminating evidence, or tend in some way to explain some facts introduced by the prosecution, or to impair or destroy the force of evidence against him—31 Ala. 342; 47 id. 68.

The declarations of a codefendant, not on trial, made in the absence of defendant, are not admissible in evidence unless made during the criminal enterprise and in furtherance of its objects—45 Cal. 19; 7 Gray, 46; 8 Serg. & R. 9; 51 N. H. 105; 7 Gratt. 641; 16 Mo. 293; 8 Ga. 406; 19 Mo. 227. If two are jointly indicted, and tried separately, the declarations of one not on trial, if there is testimony of a conspiracy made before the killing in the presence of defendant, may be received in evidence against him—49 Cal. 166.

Promises and threats made by a third person, after indictment, to a witness for the prosecution, to induce him to leave the State, are not admissible against defendant unless his connection with such third person is otherwise shown—28 Ala. 71; 49 id. 173; providing such conspiracy is afterward made—47 Cal. 397; 39 id. 52; but if made after the offense is consummated, they are not admissible against the other—43 Cal. 212; but where the accessory is tried before the principal, the

acts and conduct of the latter immediately after the offense are admissible—33 N. H. 216. It is proper for the court to instruct the jury to disregard them unless such conspiracy is proved—49 Cal. 649. They are admissible to show that the previous confessions of defendant were true—19 Iowa, 94; see *id.* 312. The declarations of one of two defendants are admissible only against the one who makes them—47 Ala. 573.

An act of a third person done in the presence of the prisoner, is equally admissible as a declaration made in his presence—1 Keyes, 66; but if made when he is not present, they are not admissible—52 Cal. 616; nor is it admissible unless it is shown that he was immediately concerned, so that his silence may be construed into an admission—33 Mo. 520; but see 9 Allen, 271. Where there are circumstances of complicity between the prisoner and his wife, evidence of her exclamations at the time of the killing, if in his presence and hearing, is admissible—45 Cal. 143; 39 *id.* 66.

If declarations are offered against another, made in his presence, and if there is evidence that he heard and understood them, the jury is to decide whether he understood them—51 Cal. 597.

The declaration of a child too young to testify is not admissible—41 Tex. 352; so of words spoken in sleep or stupor—19 Cal. 40; 39 N. Y. 39; 4 Gray, 41.

Declarations of husband cannot be given against the wife on her separate trial—50 Ind. 557; nor are the declarations of the wife admissible against the husband—19 Cal. 275. The exclusion of a declaration, when properly made and no advantage to the surprise of defendant is attempted, is not error—17 Cal. 389.

Statements in evidence.—A sworn statement made by the prisoner upon his examination as a witness, before he was accused of the crime, is admissible against him—5 Rich. 391; 10 N. Y. 13; 41 *id.* 7; but otherwise if he be under arrest at the time of the examination—15 *id.* 384; see 66 N. C. 106. The evidence of a committing magistrate as to the statements made by the prisoner on his preliminary examination are not admissible on the trial—43 Cal. 558. The Act of 1866, § 865, is not applicable to preliminary examinations—43 Cal. 559. The sheriff may testify to statements of accused after arrest, if they were made voluntarily and without threats or promise of reward—44 Cal. 539. Statements made by a prisoner in his cell, in the absence of threats or promise of reward, are admissible against him—108 Mass. 285. To prove statements made by defendant, a memorandum made at the time, or soon after, may be referred to—49 Cal. 169; but they cannot be proved by such a memorandum alone—14 *id.* 144.

Statements of third persons are inadmissible unless accompanied with proof of defendant's statement, or conduct in response thereto—54 Cal. 89; in harmony with—32 *id.* 98; 49 Cal. 171. They are evidence only so far as defendant admitted them to be correct by assent, silence, or acts on his part construed as assent, either words or conduct—49 Cal. 171; 54 *id.* 89; 32 *id.* 98.

Where defendant gives in evidence a statement made to him, he cannot prove his reply—4 Zab. 843. The party calling a witness is not permitted to prove statements made to others, which if testified to on the trial would have made out his case—49 Cal. 384. Statements made to the prisoner in respect to his connection with the alleged offense are admissible to show his conduct when they were made, but not as evidence of their truth—53 Cal. 613; 49 *id.* 172.

The exclusion of statements of the district attorney, which have a material bearing for the defense, made under circumstances of peculiar relevancy, and the credibility of his own witness, is error—34 Cal. 591.

Statements of the injured party tending to exculpate the prisoner are properly excluded—32 Cal. 100.

Conversations.—Evidence of a conversation between a co-conspirator and a third person, in presence of defendant, in which admissions were made, are admissible—49 Cal. 169; see 3 id. 106. A conversation between the prisoner and his accomplice, before the committing magistrate, may be given in evidence against him—30 Ala. 503. Evidence of part of a conversation is not admissible—50 Cal. 139; 39 id. 664; but the remainder may be proved by other witnesses—50 Cal. 139; 48 id. 236.

The plaintiff is entitled to call out all that took place in a consultation between the witness and one of the defendants—55 Cal. 185; 31 Ala. 329; see 16 Ala. 672. Conversations are to be received with great caution, but the evidence of a witness that did not hear all of a conversation is not for that reason to be excluded—47 Ala. 573. If a witness is unable to state the whole conversation, the remainder of it may be proved by another witness—50 Cal. 139; 48 id. 236. A conversation partly in English and partly in Chinese can be proved, the English part by those who understood it, the Chinese by those who understood that, if both accused and his victim understood both languages—48 Cal. 236.

A witness with a very imperfect knowledge of the language is not competent to testify to a conversation in which a confession was made, if he did not understand the whole of it—39 Cal. 663. Conversations of third persons with the witness merely to show that the fact was fixed on his recollection, are admissible—1 Dutch. 566. The deductions of the witness from the conversation are not admissible—47 Ga. 524. Evidence to prove that deceased had said in conversation some three years before the killing, that he had enemies in the country who, he was afraid, would take his life, is inadmissible—41 Cal. 40. The party whose conversation has been proved, cannot on cross-examination, show by the witness a subsequent conversation, though it related to the same subject—1 Parker Cr. R. 11.

Defendant cannot introduce statements of deceased concerning circumstances attending the difficulty in which he was wounded, made three days after he was wounded, but when in his right mind and not expecting to die—44 Cal. 435; 32 id. 100; 45 id. 146; 6 Pac. C. L. J. 917; 12 Allen. 587; 2 id. 136. Inquiry into the religious belief of deceased is not admissible on the point of credibility or competency—51 Cal. 599; 43 id. 34; 17 id. 612; 51 id. 600.

Confession of guilt.—A confession is the voluntary declaration to another, by a person who has committed a crime, of his agency or participation therein—30 Cal. 151. "Confession" is not a mere equivalent to "statement" or "declaration"—30 Cal. 151. Confessions as evidence are restricted to an acknowledgment of defendant's guilt, and the word "confession" does not apply to a statement made by the defendant of facts which tend to establish guilt—49 Cal. 637; 30 id. 157. If a person has sufficient capacity to be amenable to law, he has sufficient to make a confession of guilt—4 Har. (Del.) 563. A member of the jailer's family has no authority to take confessions—14 Gratt. 652.

Proof of confessions.—Confessions and admissions ought to be very carefully considered before they are permitted to be proved as evidence of guilt—30 Cal. 151. Thus it was held erroneous to allow proof that accused, under the influence of fear, induced by threats and violence, conducted persons to the place where the stolen property was found—29 Cal. 177. They may be proved either by the record or by oral evidence—61 Me. 171. A witness may testify to a confession made by the prisoner to him through the soil-pipes of a jail, though he only knew him from his voice—76 Pa. St. 319. The prisoner is entitled to proof of the whole confession—26 Ala. 59; 29 id. 532; but the defend-

ant cannot have the confession stricken out on the ground that the witness stated that he did not remain to hear the entire conversation—32 Cal. 560. It will be presumed that a confession made before a magistrate was reduced to writing, but it must be shown that defendant signed it, or admitted it to be correct, in order to exclude parole proof—3 Har. (Del.) 554.

Admissibility of confessions.—If a confession in a deposition made before a committing magistrate is offered in evidence, a foundation must be laid by preliminary proofs *prima facie*, that it was free and voluntary—49 Cal. 67; and defendant may prove it was not voluntary—49 id. 63. Before the confessions of prisoner can be admitted, the court must be satisfied that they were voluntarily made—40 Ala. 54. Where they are purely voluntary, they are to be submitted to the jury—43 Barb. 274; 36 N. Y. 276; 22 Me. 171; 4 Smedes & M. 31. They are admissible to show the conduct of the defendant under the circumstances—32 Cal. 98. Where a confession, in itself inadmissible, leads to the discovery of a fact, so much of it as relates to the fact, may be received—3 Heisk. 333; 5 Rich. 391. As that property which was the subject or instrument of the crime was discovered through the confession improperly obtained—20 Cal. 177; 32 Miss. 332; 36 id. 96; 2 Cold. 223; 3 W. Va. 695; 5 Parker Cr. R. 364; id. 321; 26 N. Y. 583; 99 Mass. 438; see 27 Tex. 329. A confession is admissible against the person making it, although it also implicates others who are jointly tried with him—29 Pa. St. 429; but unless a previous combination between them is proved, it is not admissible against the other—3 La. An. 714; 6 id. 167. The question of the admissibility of confessions is one for the exercise of a sound judicial discretion—31 Cal. 565; 34 id. 218. It is the province of the court to decide on the admissibility of a confession, and of the jury to estimate the degree of credit due to it—8 Bush. 366; Phill. (N. C.) 205; 63 N. C. 578; 35 Iowa, 541. The jury may believe part and disbelieve part of the prisoner's confession—3 Parker Cr. R. 401; 9 Leigh, 633; 11 La. An. 49; see 4 Cold. 190. A confession or declaration, to be admissible, need not be minute or explicit, nor define the time, place, or person with whom the transaction occurred—111 Mass. 411.

Confessions, when admissible.—Confessions, entirely voluntary, are admissible, even if, on a prior occasion, some promise of favor not acted on had been made to induce them—32 Cal. 60; 37 Vt. 191; 28 Ga. 576; and although a prisoner has previously made a confession which is free from such influence, will be admissible—20 Gratt. 724; 5 Jones, (N. C.) 315; id. 420; 6 id. 478; 3 Heisk. 403; 4 Smedes & M. 31; 12 La. An. 895; but where a subsequent confession was made on the same day as another improperly obtained, in the presence of some of the persons to whom the first confession was made, it is not admissible—37 Miss. 288. Where an employer told his employé that he would be dismissed unless he settled with the owner of the stolen property, a confession afterward made in the same conversation was admissible—2 Allen, 153; see 3 Heisk. 232; 3 Jones, (N. C.) 443. Where no hope or favor is held out, it will be competent though obtained by a promise of some collateral benefit—37 N. H. 196; 2 Met. (Ky.) 387. Where a person in jail was told that it was considered honorable in all cases, if a person was guilty, to confess, the confession was admissible—1 Gray, 461. A confession made to a fellow-prisoner is admissible—Phill. (N. C.) 447. Prisoners being in custody before the coroner's jury, were told by several of the jury that their statements were contradictory, and that if they were guilty they had better confess; a confession made next day to a person not present at the coroner's jury is admissible—36 Miss. 617. The confessions of a principal are admissible to establish the guilt of the accessory—36 Miss. 617. The confession of an accomplice, made under a promise from the prosecution that he should not be tried, is admissible—10 Pick. 478. That accused had assisted to get

another out of jail who would aid him in escaping is admissible against the one aiding his escape—23 Cal. 44; but for concealing a horse-thief, the prosecution cannot prove the confessions of the thief, in the presence of defendant, that a horse had been stolen—5 Ohio, 438. A confession made to an officer who has the prisoner in custody, if not induced by improper means, is admissible—43 Cal. 446. The circumstance, that a party is at the time under arrest, is not of itself sufficient to exclude a confession as evidence—44 Cal. 538; S. C. 2 Green C. R. 411; 11 Ga. 223; 6 Ired. 305; 4 Pa. St. 264; 18 N. Y. 9; 4 Parker Cr. R. 319.

Confessions voluntarily made after arrest, and while his hands and feet are tied, may be given in evidence against him—28 Ala. 9; 44 Miss. 332; 74 N. C. 491; 17 Ala. 192. Confessions are not to be excluded as evidence on the ground that he was illegally in custody, because twenty-four hours expired before he was taken before a magistrate—46 Cal. 48. A confession is admissible, even though obtained by artifice, or deception—2 Met. 387; 54 Mo. 478; S. C. 2 Green C. R. 602; 14 Minn. 105; see 18 Ohio St. 418. Confessions drawn out by an officer in conversation with the prisoner are admissible—11 Gray, 201; 14 Ark. 555. The mere fact that a confession is made in answer to a question which assumes the prisoner's guilt, does not, for that reason, render it inadmissible—40 Ala. 54; 37 N. Y. 303; 14 Minn. 105; 23 Ala. 28. Confessions made to an officer, without promises or threats, partly in English, and partly in German, are admissible—3 Parker Cr. R. 256. A person being arrested by officers who next day found the stolen property and told defendant of it, certain statements made by defendant as to the recovered property were admissible in evidence—108 Mass. 434.

Confessions, when not admissible.—A confession obtained by threats is not admissible in evidence, as "if you do not tell the truth, I will commit you"—4 Pa. St. 269. So, by persons armed with guns, threatening, that if he did not confess, he would be hung—4 Smedes & M. 31. Where the prisoner made confession under the influence of threats of arrest, or, after arrest, upon promises of escape, if he would confess, they are inadmissible as evidence against him—34 Cal. 218. Fear or coercion does not exclude confessions as to where stolen property is concealed—20 Cal. 177. Where no promises are made nor threats used to obtain confessions, they should not be excluded because the circumstances surrounding the defendant were threatening—47 Ala. 38; see 7 Ired. 239. Confessions made under improper inducements are not admissible—70 N. C. 356; 17 Gratt. 576; 42 N. Y. 200; 97 Mass. 574; 34 Vt. 296; 46 Mo. 566. Where a person accused of crime confesses his guilt to the examining magistrate, the confession is not admissible in evidence against him—49 Cal. 557; S. C. 1 Green C. R. 592; see 2 Dill. 405; S. C. 1 Green C. R. 439. Where a policeman told the prisoner he should be released if he would tell where he got the property, the court excluded the confession, but admitted proof of his acts in connection therewith—40 Ala. 344. So, where the officer promised to use his influence to have it go in his favor, the confession was not admissible—5 Cush. 505; see 36 Tex. 356. So, where the officer told a person accused of larceny, that, if he would tell them where to get the goods, it would end the matter—54 Mo. 192; and see 49 Ala. 9. Confessions made to the sheriff, on arrest, after being told by that officer it is useless to deny taking the property, and that there was evidence to convict him, and that it would go lighter with him if he confessed, is not a voluntary confession—41 Cal. 454. Where the arrest is made by private persons, a confession to them is not admissible—15 La. An. 145. If confessions in substance be repeated before the committing magistrate a few days after arrest, and be reduced to the form of a written statement, they are inadmissible for having been made under inducements such as to exclude the former confession—41 Cal. 454. The law presumes a subsequent confession to have been made

and influenced by the same hopes and fears as the first, and the burden is on the prosecution to establish that such influences had ceased to operate before the subsequent confession—41 Cal. 455; 1 Dev. 259; 4 Smedes & M. 31; 5 Halst. 163; 1 Sneed, 75; 38 Md. 140; 22 Ark. 336.

Objections to their admission.—It is not sufficient objection to a confession that the prisoner was urged to make a statement with no promise of favor or intimidation—17 N. H. 171. Saying to a prisoner that it would be better for him to confess, or words to that effect, or that if he was guilty it could not put him in a worse condition, and he had better tell the truth, will not exclude his confession—3 La. An. 497; 8 Ohio St. 98; *contra*, 57 Barb. 353; 37 N. H. 175; see 7 Mo. 130; 37 Ala. 106. So, where a friend advised him to confess that he was guilty and it would be better for him—8 Bush. 366; or where the officer said there was no use his denying it, and that "he had better just own up to it"—12 Ind. 100; so, where the witness "advised the defendant as a friend and a son"—10 Gray, 173; so, where an officer having defendant in custody said to him: "Come, Jack, you might as well out with it," and the magistrate interposed, and warned him not to confess; some hours afterward, the prisoner confessed to a third party, but not within hearing of the officers, the confession was admissible—5 Rich. 391. It is not a ground of objection to a confession that the defendant was intoxicated at the time, and somewhat incoherent—25 Ala. 50; but if so drunk as not to understand what he said, it must be disregarded—9 Gray, 110; they must be freely made at the time—32 Cal. 60; but if not objected to when offered on that ground, defendant must show duress, fear, or compulsion, to avoid them—10 Cal. 50.

Effect of confessions.—The confessions of a party, not made in open court, or on an examination before a magistrate, uncorroborated, and without proof *aliunde* that a crime has been committed, will not justify a conviction—50 Cal. 415; 31 id. 565; 15 Wend. 147; 12 Mo. 592; 39 id. 424; 43 Miss. 472; 47 Ala. 38; 4 Minn. 368; 1 Mont. 394; *contra*, 1 Wheel. C. C. 107; 11 Ga. 225; 7 Ired. 239; 26 Ind. 89; but this rule is not applicable to lower grades of crimes—36 Vt. 145; nor to cases where the *corpus delicti* is proved—5 Halst. 163. The defendant cannot be convicted on his extra-judicial confession alone, without corroboration—50 Cal. 416; 31 id. 565. If prosecution proves defendant's confessions, circumstances may be proved in corroboration—32 Cal. 80. It is sufficient if the confession is corroborated by a single circumstance—45 Ga. 43.

Circumstantial evidence.—Circumstantial evidence consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist, but the circumstances themselves must not rest on conjecture—32 N. Y. 141. It cannot be helped out by the jury by taking notice from their own knowledge—5 N. Y. Supreme N. S. 225; nor by evidence of law or fact introduced in other cases within the knowledge of the jury. They are to decide the case according to the evidence introduced into it—9 Gray, 133. Circumstantial evidence when relied on is to be not only consistent with the prisoner's guilt, but inconsistent with every other rational conclusion—28 Cal. 458; 30 id. 151; 32 id. 215; 41 id. 67; 34 id. 202. Each link in the chain of identification must be shown "to a moral certainty, or beyond a reasonable doubt," and so with regard to independent and material facts—39 Cal. 333; 5 Blackf. 579; 5 Cush. 313. When the prosecution seeks to draw a certain inference from a given state of facts, it is incumbent on them to show that such inference is necessary and unavoidable from the facts proved—2 Bliss. 97. To convict on circumstantial evidence, it should be such as to produce nearly the same degree of certainty as that which arises from direct testimony—42 Cal. 539; 34 id. 201. It is not sufficient that the circumstances proved coincide with the hypothesis sought to be established by the prosecution. They must exclude

to a moral certainty every other hypothesis—32 Cal. 213; 28 id. 490; 30 id. 151; 6 Pac. C. L. J. 208. In such case the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory as the direct testimony of credible eye-witnesses—34 Cal. 191. Where the circumstances proved implicate two persons equally, who are in no way connected in committing the crime, neither can be convicted—3 Humph. 289; 14 Ohio, 386. Although circumstantial evidence is not so conclusive as direct testimony, yet it equally entitles the people to a verdict—34 Cal. 191. It is the duty of the court to caution the jury against attaching too much importance to rare cases of conviction of innocent persons on circumstantial evidence—34 Cal. 191.

Concealment as a circumstance.—Concealment when an attempt is made to identify a person is proper for consideration of the jury as raising a presumption of guilt—25 Ark. 92; it may be evidence of malice and of a premeditated design—39 N. Y. 39. Where property, alleged to have been obtained by means of threats, was afterwards found concealed in defendant's house, it is admissible, as tending to show guilty knowledge and intent—30 Me. 72. The suppression, destruction, or concealment of evidence by accused, is a circumstance from which the jury may draw unfavorable inferences against him—39 Ill. 457. Falsehood, evasion, or silence on the part of one suspected of crime is evidence for the consideration of the jury on the question of guilt—62 Me. 129. Silence showing unusual seriousness on the part of one charged as participant, at or about the time of the crime, is a circumstance from which guilty knowledge may be inferred—17 Ala. 618.

Flight, as a circumstance to prove guilt.—Flight is a circumstance proper for the consideration of the jury, but it does not *per se* raise a presumption of guilt—55 Cal. 236; 54 id. 151. Although the flight of a suspected person is a circumstance tending to prove a consciousness of guilt, yet the flight of one of several conspirators is not admissible in evidence as a circumstance tending to prove the guilt of all—47 Cal. 113; see 48 id. 277. Where four men jointly commit a robbery, evidence of flight of one, on a separate trial of another who did not flee, is admissible, to show that, after arrest, he had an opportunity to throw away the money—48 Cal. 278; 27 id. 118. The fact that defendant, after being informed of the cause of his arrest, escaped, or attempted to escape, is a circumstance for the jury to consider in determining his guilt or innocence—46 Cal. 302; 14 Mo. 386; 54 id. 170; 46 Ala. 89; but such presumption is ordinarily inconclusive—23 Iowa, 430. It may be proved that accused advised an accomplice to break jail, and escape—21 Wend. 509. The offer of the prisoner to bribe the person who has him in custody to allow him to escape, may be proved—4 Gratt. 541.

Evidence of character.—Evidence of good character is relevant to the question of guilty or not guilty, and is to be considered by the jury in connection with other facts—53 Cal. 360; 49 id. 630; 44 id. 291; 45 id. 292; 28 id. 396; 17 id. 316 overruled. The jury may take evidence of good character into consideration for the purpose of determining whether it creates a reasonable doubt of his guilt—49 id. 488; 44 id. 288; 6 Cal. 243. Evidence of good character is not only of value in doubtful cases, but is entitled to be considered when the testimony tends strongly to establish the guilt of defendant, and will sometimes itself create a doubt—44 Cal. 288; 45 id. 287; id. 292; 2 Keyes, 360; 540 Barb. 342; 56 N. Y. 315; 5 Jones, (N. C.) 65; 18 Ala. 720; 47 id. 603; 5 Parker, 414; 4 id. 35; 40 Ala. 658; 34 Ill. 516; 52 Mo. 251; see 3 Strob. 517; 5 Cush. 285; 19 Ohio St. 264; 22 id. 477.

Evidence of previous good character, when evidence of guilt has rebutted the legal presumption of innocence, may be given and considered by the jury—44 Cal. 288. It is restricted to the trial of the character which is in issue, and ought to be a sure reference and

analogy to the nature of the charge—43 Cal. 137; 6 Bush, 312; 8 Smedes & M. 401; 3 Pick. 462. It must not be to a particular fact, but with reference to the whole case—5 Cal. 127; 47 Ala. 540; 51 Ill. 231; 3 Iowa, 410; see 12 id. 479; Thach. C. C. 230; and must have reference to a time before and not after the commission of the offense—46 Ala. 175; see 22 Pick. 394. A person accused of crime is entitled to the presumption of a character of ordinary fairness, and which cannot be put in peril unless he himself elects to put it in issue—43 Cal. 147. Evidence of bad character of defendant may only be given when good character is attempted to be shown, nor is the character for chastity involved in the trial for murder—43 Cal. 139. The failure of defendant to introduce evidence of good character, cannot be considered by the jury as a circumstance against him—53 N. Y. 472; 38 Me. 261; 7 Ired. 251; 1 Denio, 282; see 40 Me. 404; 6 Parker Cr. R. 120.

Admissibility of evidence.—Proof of the contents of papers in the possession of the adverse party is admissible after notice to produce the originals—2 Dev. 431; *contra*, 8 Port. 511. Where the witness was asked if he had signed a paper of a certain tenor, and before answering is shown and he examines the original, it is not error to admit his answer in evidence—43 Cal. 165. The existence of a corporation may be proved by reputation—41 Cal. 652; Thach. C. C. 180. If evidence has a tendency to prove a particular charge, it is admissible, although it also tends to prove another separate and distinct offense—38 Mo. 496; *id.* 587; 42 *id.* 242.

Where evidence is offered on the part of the defendant which is of doubtful admissibility, the better practice is to admit it than to chance a reversal—18 Cal. 187. Evidence of the prisoner's guilty participation in the commission of a crime wholly disconnected from that for which he is on trial, is not, as a general rule, admissible—31 Cal. 569; 32 *id.* 80; 27 Pa. St. 60; 2 Ark. 229; 69 N. C. 456; 5 W. Va. 532; see 1 Wheel. C. C. 73; 5 Humph. 9.

There is a wide distinction between immaterial and incompetent evidence—48 Cal. 338. It may be material, and still be incompetent—48 Cal. 338. Where irrelevant testimony is calculated to mislead or prejudice the minds of the jury, it is error to receive it—see 6 Pac. C. L. J. 882; 53 Cal. 577; 13 Ired. 184.

Ruling out evidence. Rules of evidence.—The general rules of evidence are the same in both civil and criminal cases—45 Cal. 144. Immaterial and irrelevant testimony may be ruled out—6 Pac. C. L. J. 882; *id.* 1021. The objection that evidence is immaterial does not raise the point, whether it is admissible to impeach a witness, or competent to go to his credibility—48 Cal. 338. Although information sought is immaterial, yet if defendant is not prejudiced, judgment will not be disturbed—47 Cal. 95.

A party cannot be precluded from giving evidence, unless it appear with certainty that such matters involved have been determined against him by competent judicial authority—28 Cal. 507.

A party objecting to the admission of evidence must specify the ground of his objection, or his objection will be deemed waived—48 Cal. 338; 28 *id.* 507. It is competent for the defendant, on a charge of felony, to consent to the introduction of evidence to which he might otherwise have objected—53 Cal. 741. Eavesdropping is not a valid objection to the admission of testimony—49 Cal. 169.

If evidence competent for a particular purpose is admitted, generally, and defendant fails to ask the court to limit it to such particular purpose, he cannot afterward complain that it was inadmissible for some other purpose—48 Cal. 279. If the people's witness shows she is a prostitute, the defendant is not injured by the refusal of the court to allow him to prove that fact—48 Cal. 554. Where the proffer of evidence was denied by the court "for the present," no exception re-

ceived, and the proffer not subsequently renewed, and no effort made to obtain an ultimate decision on the point, it must be considered waived—43 Cal. 32.

Competent evidence cannot be ruled out on the ground that it is inconclusive—63 Barb. 618. Ruling out testimony and permitting either personal presence of the witness giving it, or his rejected statements as taken down to be read, is not error on which a reversal will be had—28 Cal. 465.

Testimony on former trial.—The accused may waive his constitutional right to be confronted by witnesses, and testimony on a former trial may be read as evidence—29 Iowa, 133. That which a witness testified to on a former trial of the same case may be given in evidence on the second trial if he has left the State—46 Cal. 46; 45 Cal. 143; 8 C. 39 Cal. 56; see 4 Binn. 110; 10 Serg. & R. 17. It is producing the testimony anew, and is not using or referring to the former verdict—46 Cal. 46; but the substance of the testimony must be given, and not what the witness conceives it to be—3 Wash. C. C. 440; 10 Humph. 479.

Where the testimony of a witness on a former trial was founded on a written memorandum, since lost, defendant may show that it was not in the handwriting of the witness—4 Gray, 421. A grand juror may be compelled to testify as to evidence before the grand jury—7 Ired. 96; and defendant may prove by a person who was present what a witness testified to before the grand jury—25 Gratt. 921; so the testimony of a deceased witness at a preliminary examination—54 Ill. 325; 17 Ala. 354; 17 Vt. 658; 73 Pa. St. 321; but it is not proper to ask a witness to recur to his recollection of his testimony before the grand jury—11 Gray, 73.

Parole evidence of the testimony before a coroner's inquest which was reduced to writing by him is not admissible—2 Halst. 220. It is not admissible until the absence of the written evidence is accounted for—17 Ala. 415; see 15 Ala. 749. Parole evidence may be given of the contents of a writing without accounting for its absence if the object is to prove collateral facts—2 Zab. 212. The prosecution on a second trial may prove what a witness, since deceased, testified to on a former trial—47 Cal. 402; 45 Cal. 143; 35 Tex. 587; 22 Ark. 372; 23 La. An. 347; 10 Bush, 190; 43 Ga. 88. A person who kept notes, and who swears they contain the substance of the testimony, may read his notes to the jury—45 Cal. 144; but the memorandum taken is not competent evidence—3 Strob. 33.

Writings in evidence.—Press or machine copies of letters purporting to have been written by defendant are admissible in connection with proof of due effort on the part of the prosecution to produce the originals—7 Allen, 548. The contents of a letter written by defendant cannot be proved unless it is shown that the letter is destroyed or is in the possession of the adverse party—Thach. C. C. 28. The prosecution cannot give in evidence an anonymous letter—1 Denio, 83. An unanswered letter found in the pocket of the accused when he was arrested is not admissible in evidence against him—1 Parker Cr. R. 11. A letter written for the prisoner by the witness while in jail together is not admissible as evidence for the accused—23 Ala. 44.

Proof of handwriting.—To prove handwriting, a witness must have seen the person write, or have corresponded with him—2 Zab. 213; see 26 Pa. St. 338; 6 Parker Cr. R. 120; 4 Id. 319. Persons skilled in handwriting are competent to testify, although they never saw the person write—5 Ohio, 5. Experts are permitted to testify that, on comparison, they believed the handwriting to be the same—14 Ohio St. 222; 46 N. H. 497. An expert in handwriting may testify whether, in his opinion, anonymous letters, in a disguised hand, and calculated to divert suspicion from the prisoner, are in his handwriting, and may give the reason for such opinion—5 Cush. 295. The skill of an expert in hand-

writing cannot be tested by placing before him irrelevant papers to contradict his testimony as to the handwriting contained in them—12 Blatchf. 390. In the case of deeds or papers so old that no living person can be produced, the handwriting may be proved by comparison—2 Zab. 213.

When handwriting is proved by comparison, the original writing or standard must first be proved, and duplicates taken by press or copying machines are not originals—1 Cush. 189. Where a writing is proved to be genuine, comparisons may be made between it and the writing in dispute by witnesses, who may give their opinions founded on comparisons, all of which is to be submitted to the jury—53 N. H. 452; 54 N. H. 456; *contra*, 1 Denio, 343. It is for the jury to decide whether the genuineness of a writing is proved beyond a reasonable doubt—39 Vt. 225; but see 115 Mass. 481. The genuineness of handwriting cannot be proved or disproved by allowing the jury to compare it with the handwriting of the party proved or admitted genuine—21 Ill. 375.

Short-hand notes of statements of defendant, taken from interpreters, are not competent testimony—6 Pac. C. L. J. 465. The interpreter, or some witness who understands the language in which the statements were made, should prove them—*id.* Reporters' notes, taken before the committing magistrate, are *prima facie* evidence of the testimony given, but are not admissible if taken through an interpreter—54 Cal. 327. Entries in the business books of a third person are admissible in evidence—46 N. H. 497.

Advertisements may be read to the jury, in order to affect the credit of the witness, but newspapers cannot be put in evidence—2 Allen, 173. The extent to which books may be read to the jury is discretionary with the court—1 Chand. 178; 7 Gray, 51; see 49 Ill. 410. Words written on the tag of a valise may be proved by parole—99 Mass. 542. When a writing contains both legal and illegal evidence, the court is not obliged to expunge the illegal, but only to point it out to the jury—17 Ala. 618.

Adultery.—Proof of notoriety is as material as proof of the fact of adultery—46 Cal. 52; 56 Mo. 147; see 5 Blackf. 358; 13 Ill. 597; 14 Ind. 280; 12 Iowa, 499; 7 Mo. 244; 8 *id.* 494. Confessions are admissible to prove the first marriage—121 Mass. 61; 16 Ohio, 173; 3 Rich. 434; 11 Ga. 53; 14 Ala. 546; 30 Iowa, 582; 20 Ala. 66; but see 61 Mo. 171. Evidence of adultery is necessarily circumstantial—5 Neb. 283; 49 Vt. 202; and evidence of acts anterior to the period of the offense may be adduced—9 N. H. 545; 35 *id.* 22; 5 Mich. 305; 21 Pick. 509; 2 Gray, 354; 114 Mass. 285; 121 *id.* 45; 13 Ill. 597; 52 Ala. 24; 34 Tex. 142; 101 Mass. 111; but evidence of improper familiarities with others is inadmissible—10 Conn. 372; so evidence of a propensity to commit the offense is inadmissible—36 Ala. 295; so suspicions of the wife and rumors in the neighborhood are inadmissible—13 Ala. 172; 8 Humph. 63. The party with whom defendant is alleged to have committed the offense is a competent witness—13 Ala. 172; but neither husband nor wife are competent—15 Me. 104; 1 Grant, 218; 4 Minn. 335; 42 Mo. 572; but see 17 Iowa, 232.

Arson.—The evidence must be responsive to the issue—9 Cush. 594. The intent may be inferred from facts—51 Cal. 468; 52 Ala. 345; 51 Ga. 612; 63 Mo. 128; 119 Mass. 354; 10 Met. 422; 41 Tex. 598; or from threats or from other attempts—12 La. An. 382; see 47 Ill. 533. It is sufficient proof that the house belonged to the landlord—50 Cal. 306; 20 *id.* 60; or that the building was charred, though in no place burned through, is sufficient proof of burning—50 Cal. 306; 46 *id.* 354. If no question is made by the defendant of right to the possession of the land on which the building stood, testimony as to its ownership is irrelevant—32 Cal. 201. It is not necessary to conviction that the evidence should

show that the principal in the offense burned the house or applied the torch with his own hand—39 Cal. 75.

On a charge of procuring another to burn a house by means of kerosene furnished by the prisoner, it is competent to prove that there were stains of kerosene on the shirt of the accomplice when he set the fire—58 Me. 238. In an indictment for arson, with intent to defraud an insurance company, it is sufficient to prove a corporation *de facto*, the compliance of the corporation with the laws of the State need not be proved—29 Cal. 260; see 49 id. 344; 41 id. 645; 28 id. 507; 11 Wheat. 392. The testimony of the agent of the corporation is sufficient to warrant the jury in finding its *de facto* existence—29 Cal. 260; 32 id. 165; 49 id. 344; 6 Nev. 185. It is not necessary to prove that the policy was valid—21 Cal. 261. Upon a separate trial the attempt of the other party to procure payment from the insurer is competent as acts and declarations of a co-conspirator—39 Cal. 75. See *ante*, §§ 447-455.

Assault.—The burden of proof is on the prosecution to show guilt beyond a reasonable doubt—1 Gray, 61; see 3 Ired. 357. The prosecution must prove the time and place of the alleged assault—34 Ind. 104; see id. 436; 8 id. 336; 32 Ala. 575; but if the proof shows it in a different town, the variance is not material—8 Gray, 388. The circumstances which in fact led to the assault, are part of the *res gestæ*—29 Ga. 723; as facts tending to show adultery with the prisoner's wife—10 Mich. 212.

Where the evidence tended to show that defendant was assaulted by the party injured and several other persons, what was said by these persons at the time of the assault is a part of the *res gestæ*, and is admissible—17 Cal. 297; but see 3 Heisk. 420.

Declarations of the party assaulted made immediately after the encounter are admissible as part of the *res gestæ*—32 Ga. 672; 48 id. 607. The declarations of the defendant made the next day after the occurrence are admissible on the question of malice—51 Ga. 429; so of his declarations made a short time before—2 Ind. 438; 28 Ala. 693. A letter written by a co-conspirator, subsequent to the occurrence, is admissible in evidence against the defendant—26 Ala. 44.

The question of malice is a question of fact for the jury—51 Ga. 402. Where the prosecuting witness retreated and was followed by the defendant, what occurred at the place where she took refuge is admissible on the question of intent—27 Cal. 630. On a charge of assault with intent, the intent cannot be implied, but must be proved as a fact—5 Har. (Del.) 608; and the proof must be as of the time of the act—1 Thomp. & C. 333.

The particular intent alleged must be proved—28 Ala. 693. It is sustained by proof of intent to commit any felonious homicide—1 Parker Cr. R. 327. Proof that the assault was made willfully and maliciously, with the intent charged, is sufficient—19 Ohio, 379; 9 Conn. 259. The preconceived intention of committing the assault may be proved in aggravation—4 Eng. 42.

Proof of intoxication is admissible on the question of intent—32 Ala. 419. The intent is a question of fact for the jury—29 Mo. 419; 47 Ga. 568. So, whether an assault by lying in wait is deliberate is a question of fact—3 Heisk. 342. The party named in the indictment must be proved to be the party assaulted—36 Tex. 113; 49 Miss. 17; but a slight variance in his name or designation is not material—3 Met. 330. It is not material where the names may be sounded alike—28 Ala. 53; see 18 Mo. 320; 7 Blackf. 324.

Declarations of the party assaulted are admissible as tending to point out the individual who committed the assault—3 Ired. 504. Proof of the commission of an assault on one will not sustain a charge of an assault on two—8 Iowa, 203. On a charge of an assault with a danger-

ous weapon, the prosecution need not prove with what weapon the assault was made—5 Parker Cr. R. 39; 11 N. H. 271; and where several weapons are charged, it is immaterial whether he used one or all of them—1 Iowa, 392. Whether a weapon is dangerous is a question of law; but where the question is, whether an assault with the weapon, from the manner of its use, or the part of the body attempted to be struck, endangers life or not, is a question for the jury—2 Curt. 241. Where an assault was made with a pistol beyond striking distance, it must be shown that the pistol was loaded—6 Nev. 113.

Proof of attempt or offer to strike will not sustain a charge of assault by striking—35 Ala. 363. Where the circumstances show an abandoned and malignant heart, an assault with a deadly weapon, with intent to inflict bodily injury, has been proved—18 Cal. 636.

To sustain a conviction for an assault with intent to kill, the proof must be such that if death had ensued it would have been murder—46 Ga. 159; 51 Id. 402; id. 429; 52 Id. 88; 22 Gratt. 924; 37 Me. 468; 3 Eng. 451; 5 Id. 318; see 2 Minn. 123; 18 Ala. 532; but the jury must be satisfied beyond a reasonable doubt—28 Ala. 693; 58 N. Y. 354; 45 Ala. 66. Evidence of experts on the trial as to the location, character, and probable consequences of the wound, is admissible as bearing on the intent—1 Thomp. & C. 333; 19 N. Y. 41.

Assault to murder.—On a trial for an assault with intent to commit murder, evidence of a conversation between the parties immediately after the assault, which is, perhaps, a portion of the *res gestæ*, is admissible—49 Cal. 391; but if it is ruled out by the court, judgment will not be disturbed, if the bill of exceptions fails to show a conflict of evidence—49 Cal. 391. It is not competent for the defendant to prove his general good character—8 Fla. 56; 10 B. Mon. 225. An assault with intent to murder cannot be excused on the ground that it was in defense of property—3 Ired. 186; 1 Mont. 41. Mere threats made will not excuse a deadly assault, when the party assailed had made no attempt of a hostile or equivocal character—45 N. Y. 260. Where the defendant was the aggressor, he cannot mitigate the offense by proving that it was committed under the influence of sudden passion—41 Tex. 494; nor that his adversary had armed himself for a voluntary fight—36 Id. 42.

Bribery.—Where the statute requires corroborating testimony, the corroborating evidence must go directly to the fact of the bribe—3 Bush, 469.

Burglary.—To sustain an indictment for burglary of a dwelling-house, it must be proved that some one lived in the house—48 Ala. 273. The tenure by which the occupier holds the premises, is immaterial—49 Ala. 344. Where it was proved that the occupier had deserted his family two weeks before, it is no variance—110 Mass. 503. It is not a presumption of law that a felonious breaking into a dwelling-house was committed in the night rather than in the day-time—4 Jones (N. C.) 349. The question as to the time of breaking and entering, is one of fact, for the jury—35 Conn. 515. The prosecution may prove the offense committed at a time and place admitted to be other than and distinct from those mentioned or intended to be charged in the indictment—48 Cal. 551. It is not material to prove whether or not there was sufficient light to distinguish a man's face—5 How. (Miss.) 20.

Identification of a person by his voice, may be sufficient—105 Mass. 62. It need not be proved that goods were actually stolen, it is sufficient to prove the intent—5 Bush, 376; and if larceny is proved, it is sufficient evidence of the intent—12 N. H. 42; 4 Parker Cr. R. 153; but there must be some fact or circumstance, act, or declaration of defendant in addition to mere breaking and entering, from which the jury can find the intent—4 Parker Cr. R. 153; and proof of intent to steal is not sufficient—11 N. H. 268.

Other criminal acts than those charged, may be proved against the defendant, to show guilty knowledge, establish identity, make out the *res gestæ*, or complete the chain of circumstantial evidence—42 Ala. 532; but evidence of other distinct burglaries is *prima facie* irrelevant—42 Ala. 532; 16 Mich. 507. So, evidence tending to show that goods were found in the prisoner's possession stolen from another person, previous to the transaction in question, is improper—6 Parker Cr. R. 671. So, evidence to prove that the ward of a key found in defendant's possession was made and fitted by him to open another building, is improper—2 Cush. 590.

Burglarious tools found in the possession of the defendant soon after the commission of the offense may be offered in evidence when they constitute a link in the chain of circumstances tending to connect him with the crime—29 Cal. 659; see 49 Mo. 573; but it must first be shown that the burglary was in fact committed—23 Cal. 660.

Proof of breaking and entering a shop is sufficient to convict under the charge of breaking and entering a store—5 La. An. 340; see 14 Gray, 103; and proof of a constructive breaking is sufficient—18 Ohio, 308; but proof of breaking out of a house will not sustain a charge of breaking, entering, and stealing—70 N. C. 239. Proof of entry in a different room, or at a different time from that alleged, is insufficient—48 Cal. 551. Proof of an entrance obtained by stratagem, or such an entrance as would be a mere trespass, is not sufficient—25 Me. 500. See *ante*, § 459.

The breaking and entering may be shown by facts and circumstances—49 Cal. 581; and the intent may be proved by circumstances tending to show a felony committed in a store adjoining—2 Parker Cr. R. 533. It must be proved that the doors were shut—Coxe, (N. J.) 439. The wife of the complaining witness is competent to prove that the door was latched—3 Parker Cr. R. 552. Where it was proved that the door had been forced open, the jury might infer that it had previously been shut—Thach. C. C. 1.

The testimony of a woman sleeping in the building that she believed the entry was made for the purpose of sexual commerce with her, if admissible, could not conclusively establish the intent of defendant—53 Cal. 415. On an allegation of attempt to commit rape, the effects of the alleged violence on the person of the female may be proved—10 Cush. 52. Evidence upon the question of guilty or not guilty of a burglary charged is competent to prove an attempt to commit it—56 Barb. 126.

Challenge to fight.—The note or letter sent, and parole testimony in explanation, are admissible in evidence—2 Leach, 767. That there has been a challenge is a question for the jury—6 Marsh. J. J. 119; 2 Nott & McC. 181; 1 McMull. 126; 4 Mo. 375. Concert being proved, the admissions of the second are evidence against the principal—2 McCord, 334.

Embezzlement.—The employer is a competent witness to show that he did not authorize his servant or agent to do the acts complained of, and that accused has not accounted to him for the property—4 Parker Cr. R. 662. The indictment is supported by proof that the property embezzled was delivered to some one acting for the defendant—38 Me. 81. A person cannot be convicted upon proof that he received money to pay a note and did not pay the same, unless it is further proved that he received the money as agent, and failed to pay the same in consequence of some fraudulent use or conversion of the money—9 E. I. 112. Where the agent of an express company stated that the money was stolen from him on the way, in the absence of any reasonable account of the occurrence, he may be convicted—32 Tex. 763. On the embezzlement of a mortgage, it must be proved that defendant feloniously and fraudulently converted it to his own use,

and that it belonged to the complainant—5 Allen, 502; see 11 Blatchf. 374. On a trial for embezzling United States bonds, it is not necessary to show that the several bonds were misappropriated by separate acts, or at different times, to justify a conviction on each of the counts in which the bonds are separately described—100 Mass. 1. Evidence of other acts of embezzlement than that charged in the indictment is admissible on the question of guilty intent—1 Allen, 575; 10 Gray, 173. A copy of an agreement made between the defendant and the prosecutor is not admissible without first accounting for the original—43 Cal. 654.

Gambling.—The proof of gambling is necessarily inferential, as from possession and use of implements for gambling—43 Mo. 470; 30 Tex. 48; from the use of which the scienter may be inferred—2 Dana, 418. Ownership may be proved by admissions, or by acts of authority, or by record—R. M. Charl. 5. It cannot be shown by reputation—7 Iowa, 411; but it may be inferred from circumstances—46 Iowa, 662; 24 Tex. 557. A partner in the game is an accomplice requiring his evidence to be corroborated—35 Ala. 428.

Homicide, burden of proof.—The prosecution are only bound to introduce such evidence as they think proper—9 Ired. 342. A homicide may be proved to have been committed at any time previous to finding the indictment—18 Tex. 343; and a variance as to the time of the death is immaterial—1 Jones, (N. C.) 267. It is too late after verdict to object that the death was not proved to have resulted within a year and a day after the fatal injury—54 Barb. 367; 2 Keyes, 684. If the true name of the defendant is proved on the trial, or if the deceased was called among his acquaintances by the name charged, a variance is immaterial—6 Parker Cr. R. 15; but if there is a variance between the name alleged and that proved, the variance is fatal—4 Cold. 133; but if the variance is between initials and the full christian name, it is immaterial—11 Ga. 615. So where deceased was equally well known by both names there was no misnomer—6 Parker Cr. R. 155. The correct statement of the name of deceased is a question for the jury—13 Miss. 331; 7 Ired 27; *contra*, 6 Parker Cr. R. 155.

Premeditation must be proved by the prosecution—3 Kans. 450; 24 Wend. 520; and it may be proved by circumstances—Wright, 20. That lying in wait constitutes deliberation and premeditation is a question of fact—3 Helsk. 342. Premeditation may be shown by proof of purpose to commit robbery—118 Mass. 36. It is erroneous to charge that the homicide being proved, the law implies that the killing was willful, deliberate, and premeditated—45 Cal. 289. The question of cooling time is for the court—69 N. C. 267.

Corpus delicti.—The prosecution must prove the *corpus delicti* beyond a reasonable doubt—42 N. Y. 1; 48 Barb. 625. There must be direct proof of death, or the criminal agency of another as the means—49 N. Y. 137; 18 id. 179. In general, there can be no conviction for murder until the body of deceased has been found—3 Parker Cr. R. 199. Where the discovery of the body is impossible, the fact of death may be proved by circumstances—1 Cliff. 5; 7 Ind. 326; 7 Jones (N. C.) 446. Where the body has been consumed by fire, or boiled in potash, or dissolved by acids, rendering it impossible that it should ever be produced, the *corpus delicti* may be proved circumstantially or inferentially—55 Cal. 230. A witness who had found the discolored and mutilated body of a person whom he had never seen, may testify that the face resembles the photograph of the man alleged to have been killed—76 Pa. St. 340.

On a trial for murder, photographs of alleged accomplices, taken after their death by drowning, may be shown to witnesses in corroboration of other evidence identifying their bodies—45 N. Y. 213. It is competent for the prosecution to show that a skeleton is that of the murdered man—48 Ind. 109; so, of the clothing, equipments, or skull

of the victim—6 Parker Cr. R. 155; but see 24 Iowa, 570. Ordinarily, the question of identity is one of fact—3 Parker Cr. R. 199. There need be no more direct or positive proof to identify the body of deceased than is required to prove the murder or identify the murderer—35 Tex. 97.

Means and instruments.—The evidence need not show that the act was committed by the particular weapon alleged—32 Me. 369; 5 Smedes & M. 510; 14 Rich. 215; 7 Yerg. 513; 3 Hill. 432; 1 Dutch. 566; 2 Id. 463; but where a particular weapon is alleged, it is not competent to prove it was done with a totally different weapon—6 Cold. 5. If the indictment charged a killing by shooting, the prosecution is bound to prove it, but it does not matter which of the bullets or which of the wounds caused the death—55 Barb. 551; 42 N. Y. 270. On an allegation of poisoning, proof of obtaining the poison, and placing it in the food of deceased, is sufficient—6 Parker Cr. R. 371; 34 N. Y. 223; see 3 Heisk. 14. On a charge of shooting, evidence of death caused by beating on the head with a gun is inadmissible—43 Ill. 226. On a charge of death by beating and striking, proof of death from injuries by falling is insufficient—4 Parker Cr. R. 514. Whether any, or what weapon was used, is a question for the jury—4 Parker Cr. R. 619; but the question whether or not the instrument was deadly, is a question for the court—4 Pa. St. 264. The opinion of experts as to the instrument used, and the nature and consequences of the wound, is admissible—23 Iowa, 270; 34 Id. 131; or, to prove which of the wounds caused the death—36 N. Y. 642; but not as to the probable position of the deceased when the wounds were inflicted—6 N. Y. Trans. App. 19.

Res gestæ.—Everything which happened in the immediate presence and hearing of the defendant, at the time of the homicide, is admissible as tending to show motive—36 N. Y. 113; as, acts of the prisoner on the day of the homicide—23 Ala. 44; see 26 Id. 31. Acts and words, to be part of the *res gestæ*, must be contemporaneous, or so nearly so, as to have a bearing in illustrating the character of the offense—17 Cal. 70. What was said by deceased to others when possessing himself of a deadly weapon found near his body after the conflict, though defendant was not present, is part of the *res gestæ*—15 Cal. 476. Ownership of property is part of the *res gestæ*, when the homicide occurred in defense of its possession—15 Cal. 350; but deeds, or other evidence of title to land, about the possession of which the homicide occurred, are not evidence—10 Cal. 83; but see 15 Id. 350. So, where two persons are murdered at the same time and place, what occurred at the murder of one, is admissible on a trial for the murder of the other—76 Pa. St. 319; see 117 Mass. 122; 8 Eng. 236; 1 Rob. Va. 735.

On a trial for murder, evidence that the wife of the prisoner had been in the habit of adultery with the deceased is not admissible—8 Ired. 330. Evidence of acts, and exclamation of the wife of prisoner at the time of the killing, and in his presence or hearing, is admissible—45 Cal. 143.

Proof of intent.—Intent to kill will be presumed when a person voluntarily does an act which has a direct tendency to destroy life—9 Met. 93; 9 Humph. 657; Wright, 20; 5 Cush. 295; 2 Gratt. 594; 17 Ala. 587; see 1 Ired. 354. It will be implied from the use of a dangerous weapon—12 Fla. 117; 1 Duval, 224; 7 Iowa, 287; *contra*, 3 Dev. 485; 31 Pa. St. 198; 6 Eng. 455; 3 Oreg. 61; 44 Miss. 731. So, shooting one person with intent to kill another, is sufficient showing of intent—38 Cal. 141.

The drunkenness of accused at the time of the act may be proved on the question of guilty intent—34 Cal. 211; 43 Id. 344. It may be considered with the other facts, to enable the jury to determine whether the killing was done deliberately and premeditatedly—21 Cal. 544; 27 Id. 507; 11 Humph. 154; 1 Spear, 384; 4 Humph. 136; 9 Id. 663; 8 Id. 671; or to prove the prisoner was not capable of deliberation—40 Conn. 136; see 41 Id. 584.

Character of defendant.—On a trial for murder, the character of the defendant for peace and quiet is involved in the issue of not guilty—28 Cal. 395; overruling 5 Cal. 127; 7 id. 120; 17 id. 316; 33 Ala. 390; but proof of the general character of defendant is confined to the trait involved in the offense charged—43 Cal. 133; 8 Smedes & M. 401; 3 Blackf. 290. So, his character for chastity is not in issue—43 Cal. 139.

Character of deceased.—It is not competent to show that deceased was a quarrelsome and dangerous man unless there is evidence raising a doubt whether defendant acted in self-defense—10 Cal. 303; 41 id. 640; 2 Kan. 419. It is not a material question whether deceased was in fact a man of dangerous character; it is his reputation as such that constitutes the legitimate subject of inquiry—39 Cal. 704. It is admissible only when it tends in some way to show the prisoner had some grounds, as a reasonable man, to fear that he was himself about to receive some bodily harm, and that he acted under the influence of fear—41 Cal. 640; 10 id. 310. Where the defense introduces testimony as to the character of deceased, the prosecution has a right to introduce testimony on the same point—3 Pac. C. L. J. 882.

Threats as evidence.—Threats made by defendant are admissible for the purpose of showing malice—37 Cal. 676. Evidence that the prisoner made threats without naming against whom, but that in the opinion of the witness, defendant was meant, is not competent evidence—9 Bush, 224. Threats by defendant against one, other than the deceased, cannot be shown to have been made immediately prior to the homicide, nor will quarrels be permitted to be proved—23 Cal. 465; 37 id. 637. Threats by deceased are admissible to show that the circumstances were such as to excite the reasonable fears of defendant—37 Cal. 676. It is proper to show that threats were communicated to defendant which were made by deceased—17 Cal. 316. Threats communicated to defendant are not necessarily admissible without regard to the evidence, or facts relating to the homicide—53 Cal. 602. They are admissible, although unknown to the defendant, as facts tending to illustrate the question as to which was the first assailant—37 Cal. 676; but evidence of violent acts of the deceased, not performed in the presence of the defendant, is not admissible—23 Cal. 465.

Upon the question, who commenced the affray, evidence is admissible to show that the deceased attempted to fulfill his threat—55 Cal. 264; see 15 id. 476; 37 id. 676. Guilty knowledge on the part of the prisoner that deceased was unarmed, cannot be assumed to exist, but must affirmatively be shown—51 Cal. 473. Where threats by deceased, made to a third person, were admitted in evidence, and defendant had the benefit of all the conversation tending to show hostility, it was not error to exclude evidence of what deceased said concerning defendant, or tending to show malice toward him—6 Pac. C. L. J. 594. If a witness for the defense testified that before the killing, deceased asked him to go with him and help him tear down defendant's fence on a certain night, and made threats against the defendant, it is not error for the court to refuse to allow the witness to state whether the fence was torn down that night—47 Cal. 85. If threats by deceased are introduced by defendant, the prosecution may rebut the evidence, but it cannot, in the first instance, introduce declarations of deceased of peaceable intentions—6 Pac. C. L. J. 917.

Dying declarations.—Dying declarations, when made by the deceased, are evidence on the trial—10 Cal. 32; see 17 id. 76; 24 id. 17; id. 640; 18 id. 166; 21 id. 368; 35 id. 49; 2 Leach, 267; id. 533. Evidence of the dying declarations of a deceased person are admissible on a trial for murder—10 Cal. 32; upon the ground of necessity—10 id. 32. Before admitting such declarations in evidence, it must be conclusively shown that declarant was at the point of death, and that he was conscious thereof—24 id. 17; 18 id. 166; 17 id. 76. Where there is a clear indication that deceased at the time had not abandoned all hope of recov-

ery, the declaration is not admissible—55 Cal. 72; 24 Id. 17. They are not admissible unless declarant believes himself in such extremity that every hope of this world is gone, and dissolution is actually impending—49 Cal. 652; 55 Id. 72; 24 Id. 17; 2 Leach, 563; and the existence of such belief may be shown from circumstances—24 Id. 17. Dying declarations cannot be excluded for the reason that deceased refused to answer further, saying he was a "dying man"—51 Cal. 597. Admitting a portion of a dying declaration does not prejudice defendant when his witnesses substantially testify to all the particular details of such fact—53 Cal. 577.

Incest.—The admissions of defendant are sufficient proof of relationship—11 Ala. 289; 1 Parker Cr. R. 344. Relationship may be proved by reputation—54 Mo. 142. So, it may be proved by acts and declarations—34 Iowa, 547. Evidence is admissible of previous acts as tending to show the probable commission of the act charged—5 Mich. 305; but if a certain day is alleged, the prosecution cannot show the sexual intercourse at a subsequent time—12 Ind. 18. Something more must be shown than an attempt to contract an incestuous marriage—14 Cal. 159. See *ante*, § 285.

Larceny, what must be shown.—It must be first shown that a larceny had been committed—1 Rich. (N. S.) 14. The place of the commission of the offense is not material, if the county is alleged—101 Mass. 207. So a variance between the indictment and the proof as to the exact locality is not material—3 Denio, 121; as a shop for a store—14 Gray, 376; see 15 Id. 197; but an indictment for larceny from a house is not sustained by proof of stealing from a tent—41 Tex. 43; nor by proof of stealing goods outside a store door—41 Id. 126. So the description of the termini between which letters are sent by post is material—1 Curt. 364. A taking as well as a carrying away must be shown—Addis. 232. The stealing and carrying away may be proved by evidence that defendant rode, drove, or led the horse away—2 Ill. 304. And it is competent to prove that the goods were stolen in another State—18 Ala. 727. So in stealing from the mail, the jury must be satisfied not only that the mail had been violated, but that the letters and packages had been in and were taken from the mail—1 Bald. 51. The offense is proved, although only to a single article out of several—3 Hill, 194. So if more than was alleged is proved to have been taken, the variance is immaterial—14 Ind. 327; 2 Va. Cas. 4; see 8 Ala. 591.

Evidence of prior conviction.—The averment of a prior conviction must be proved by the record—2 Gray, 502; see 65 Barb. 342; 55 N. Y. 512; sustained by proof of identity of the party on trial with the one in the former procedure—26 Ga. 614; 14 Serg. & R. 69; 47 Md. 497. It is admissible to put the prior conviction before the jury as part of the evidence in chief—65 Barb. 342; 55 N. Y. 512; 36 Tex. 6.

Description of property.—To justify a verdict of guilty of larceny it is not necessary to prove that the money taken answers the description contained in the information—6 Pac. C. L. J. 453. The denomination and nature of the coin need not be proved, nor the date of bank-notes, the bank which issued them, or the person to whom they were payable—10 Ga. 511. A slight variance in the description of the property will not be regarded—23 Ind. 21; as proof of the theft of a mare or gelding on indictment for stealing a horse—2 Ill. 304; 34 Mo. 67; or a lamb for a sheep—2 Har. (Del.) 561; or a shoat for a hog—7 Ired. 210; or plated-ware for silver-ware—22 Ohio St. 203; 13 Vt. 571; 70 N. C. 78.

When an animal stolen is described by color and sex, the description must be supported by proof—30 Me. 29; but sorrel may be proved when the description was a bay—3 Helsk. 452. An indictment for stealing an animal is not supported by proof that it was dead—8 Gray, 497; nor will proof of orders support a charge for stealing bank-bills—10 Ohio, 510; or proof of a plowshare on a charge of stealing a plow

—15 Rich. 316; or the run of a plow on a charge of stealing a plow—3 Brev. 5; or a blanket made of cotton and woolen on a charge of stealing a woolen sheet—1 Denio. 80; or two pairs of boots unmatched on a charge of stealing "one pair of boots"—3 Har. (Del.) 559. To support a charge of stealing two barrels of turpentine, it must be proved that it was in barrels when stolen—11 Ired. 70.

Ownership.—When ownership is laid in a married woman, it must be proved as laid—17 Gratt. 563; *Id.* 565; see 44 Ind. 469; 17 Tex. 521; 15 Rich. 39. A variance in the name of the owner is immaterial—22 Me. 171; 48 Ala. 165; but see 1 Bush, 11. It is a question for the jury—7 Ired. 210. Where property was alleged to be stolen from a corporation, it is sufficient to prove that it is a corporation *de facto*—49 Cal. 342; 28 Ind. 321.

The fact of ownership may be proved by others than the owner.—4 Yerg. 145. A written receipt for the purchase-money of goods is evidence to show title—40 Ala. 372. The testimony of a consignee is sufficient evidence that the property is in him—104 Mass. 552. The goods may be proved to be the absolute or special property of him who is charged to be the owner—19 Me. 225. So, if he had possession as agent or bailee, the defendant may be convicted—40 Ala. 54; see 10 Yerg. 549. So, proof of rightful possession will sustain an allegation of ownership—1 Ga. 563; so, as to the possession of a house—25 *Id.* 52; but, where property had never been in the possession of the agent, it is a fatal variance—35 Tex. 15. Proof that property was held in trust will support an allegation of ownership—21 Me. 14; 1 Parker Cr. R. 329; 63 Me. 124.

An indictment alleging property in a single person is not sustained by evidence of property in several as partners.—1 Mass. 476; 3 Blackf. 226; 14 N. H. 364; 10 Rich. 169; 3 Rich. N. S. 230; 41 Ala. 416; 74 N. C. 272; but see 5 Allen, 517; and so, where title is alleged in two, and the proof is that it belonged only to one—35 Tex. 691. The fact that the money stolen was in the possession of a third party, is sufficient proof of ownership—6 Pac. C. L. J. 453. Where a witness proved the ownership of the horse, and that it was taken from his possession, and another witness proved that the thief had sold the horse to him, it is sufficient evidence to support a conviction—6 Pac. C. L. J. 569.

Value.—The genuineness of a bank-note must be proved—3 Har. (Del.) 563; 4 Rich. 356; 4 Denio, 364; 2 Keyes, 145. It may be proved by the person from whom stolen—31 Ala. 329; 8 Gray, 492; 57 Barb. 327. Evidence that defendant passed it as genuine is sufficient proof of genuineness and value—2 Va. Cas. 125; 6 Parker Cr. R. 256. Parole evidence of the contents of the bills is admissible—18 Johns. 90. The witness may refresh his recollection of the value of the goods from a schedule made by his clerk in his presence—37 Me. 246. Where punishment does not depend on value, proof of value is not essential—12 Allen, 183. Evidence that the witness went one hundred miles to hunt the stolen horse, would tend to prove that he was of some value—8 Eng. 66.

Identity.—The identity of the goods stolen must be proved—43 Cal. 638; see 19 *Id.* 603. In larceny of coin, the jury must determine whether the coin proved is of the same kind as that stolen—23 Cal. 150. Identity and ownership of stolen property, how established by proof—43 Cal. 639.

Guilt knowledge.—The guilty knowledge and intent of the defendant must be proved—47 Cal. 103; 32 Mo. 571. So, in the case of hiring a horse promising to return it by evening—18 Cal. 337; 23 *Id.* 280. So, where defendant was with one who stole, and saw him steal without interference on his part—27 Cal. 489. Evidence that other stolen property was found in defendant's possession, is admissible to show guilty knowledge—15 Mo. 168. The defense cannot prove that he

is a minor, for the purpose of showing that he was acting under the control of his mother—29 Cal. 414.

Res gestæ.—It is competent for the defendant to show that he was acting under a mistake, and whether real or feigned is a question for the jury—34 Ga. 208; as evidence is admissible to explain his conduct and intention—55 Mo. 83; 16 Cal. 369. It is competent for defendant to prove what he said in reply to the charge when arrested—63 N. C. 520. So his declaration as to his intention made at the time of taking the property, is part of the *res gestæ*—41 Tex. 205; 7 Eng. 782. The jury are the judges as to the title of the property, the taking and carrying away, and the intent—14 Cal. 438.

The *corpus delicti* must be proved otherwise than by confessions of guilt—41 Miss. 582. A confession made subsequent to the arrest is not rendered inadmissible by a promise made by the owner previous to the arrest—3 Hill, 395. A prisoner's confession that he took "Mass Lee's" mule is not competent evidence without identification of "Mass Lee" with the alleged owner—40 Ala. 357. The declarations as to the manner in which he came into possession are not competent evidence in his favor—42 Ala. 529; 46 id. 85; 63 Me. 124. But the admissions of the defendant are not to be excluded on the ground that the alleged owner is not examined as a witness—12 Met. 235. It may be proved that the prisoner, when charged with the theft, made no reply—20 Iowa, 267. The attempt to escape is a circumstance that the jury may consider in determining his guilt or innocence—46 Cal. 303. If the stolen property is found concealed, evidence may be introduced to show how the finder was informed of the place of concealment, even if the information was obtained by duress, and came from one other than defendant—47 Cal. 105. The offer of the prisoner to show where the money is buried is admissible, but not the statement, "I buried it in the ground there"—34 Cal. 176. The offer to pay for the property stolen is not a confession—40 Ga. 529.

Libel.—The post-mark on a letter is *prima facie* evidence that the letter was put into the office at the place marked—15 Conn. 206; 3 Watts, 321. The circulation of a libel is proof of publication—3 Pick. 304. See *post*, § 1125.

Malicious mischief.—The owner of the property injured may be a witness for the prosecution—33 Me. 361. Where the indictment alleges ownership, it must be proved as laid—30 Me. 182; but proof of possession and occupation is sufficient proof of ownership—7 Barb. 9; see 16 Gray, 235. A witness acquainted with the animal shot may state his opinion as to the extent of damage caused by the wound—37 Ala. 457. The declarations of the defendant immediately after the occurrence are admissible in his behalf—46 Mo. 490; see 32 Tex. 84. Proof that the act was done either maliciously or wantonly is sufficient—40 Me. 562; but evidence of malice toward the son of the owner is not admissible—42 Ala. 330. Yet it is sufficient to prove malice against a bailee—3 Helsk. 457. The question of malice is one of fact for the jury, to be inferred from the circumstances—36 Iowa, 107. In an indictment for maliciously obstructing a railroad track, it is sufficient if the proof shows that one piece of timber was placed on the track to obstruct the cars—42 Ind. 354. So, evidence of other obstructions is admissible when the acts are so connected as to form one entire transaction—37 N. H. 196. It is competent for defendant to show facts in justification of his act—30 Ga. 325.

Perjury.—Evidence that defendant was sworn supports the allegation that he took his corporeal oath—17 N. H. 375. It is sufficient to prove that the oath was administered by an officer *de facto*—32 Mich. 464. The certificate of the magistrate before whom the alleged false oath was taken is *prima facie* evidence that he took the oath—11 Met. 466. It must be proved that the person before whom the oath was

taken was authorized by law to administer it—32 Ill. 429. On a charge of perjury before a committing magistrate, the prosecution may prove what defendant swore to by parole evidence—50 Cal. 93; Thach. C. C. 604. The materiality of the matter sworn to must be established by evidence—32 Iowa, 403; 10 Kan. 157. It is competent to show that the motives of defendant were corrupt—6 N. H. 352. That the false oath was taken willfully and corruptly must be established by proof—41 Ala. 419. The falsity of matter sworn to may be proved by books and papers kept by the party and under his control—Deady, 127. Where the prosecution makes out a *prima facie* case, the burden is cast on the prisoner to prove surprise, inadvertence, or mistake—30 Vt. 539. To authorize a conviction, the statements of the defendant must be disproved by two witnesses, or by one witness and corroborating circumstances—1 Bond, 1; 20 Iowa, 582; Thach. C. C. 654; 1 Nott. & McC. 546; but the law does not require two witnesses to establish the giving of the testimony, but only to prove its falsity—17 Iowa, 18; 12 Met. 223.

The testimony of one witness, and the declarations of the prisoner, are sufficient—1 Dev. 263. Declarations of defendant are not sufficient to convict—30 Mo. 364. The corroborative proof need not be equivalent to the testimony of another witness—10 Ohio St. 258; 57 Mo. 252; *contra*, 29 Ind. 442. A party to a suit may be a witness to prove perjury therein, where conviction would not entitle him to a new trial, or damages—1 Chlp. D. 124. Where written testimony is adduced to prove the perjury, it is not necessary to produce a living witness—14 Peters, 430. So, where a person, by a subsequent deposition, contradicts a former one, admitting that it was intentionally false—9 Barb. 467; but the prisoner is not estopped from showing the truth of his deposition—1 Tyler, 269. Facts material to the issue are relevant evidence—30 Ala. 511. The list of an assessor is not competent evidence to prove the property therein to be that given in by defendant—18 Cal. 125.

A record is admissible, notwithstanding a variance as to the date as proved and alleged—Thach. C. C. 654. The record of the court is not inadmissible, because of misrecital in the indictment of the day of holding the court—2 Tyler, 282. A complaint, sworn to, is admissible to show the pendency of the case in which the perjury is alleged—54 Cal. 527. The good character of defendant may be given in evidence, but it is entitled to little weight—14 Mo. 502. If perjury is charged as having been committed on examination before the committing magistrate, the prosecution on the trial may prove by parole evidence what accused swore to at the examination—50 Cal. 96.

Where the indictment alleges the manner of taking the oath, a failure to prove that he was so sworn will be a fatal variance—69 N. C. 383; see 1 Parker Cr. R. 317. Any discrepancy between what defendant swore to and what is set out in the indictment will be fatal—1 Bond, 1. A variance in the nature of the proceedings in which the false oath is alleged to have been taken, is fatal—1 Parker Cr. R. 317; 47 Ala. 47; but see 2 Dev. 470; Thach. C. C. 654; 1 Parker Cr. R. 211; *id.* 387. A variance in the place in which a certificate is sworn to is immaterial—108 Mass. 473. A person may be convicted of subornation of perjury, on the testimony of a single witness—5 Met. 241; but see 40 N. Y. 1.

Nuisance.—Nuisance may be proved inferentially, but only the nuisance specifically charged can be proved—13 Met. 365. General reputation cannot be admitted to prove or disprove nuisance—45 N. H. 466; 1 Serg. & R. 342; 2 Dana, 418; 3 How. (Miss.) 328; but evidence of the general character for chastity of females frequenting a house of ill-fame is admissible—1 Allen, 7; and also, of the effect of the house on the peace of the neighborhood—14 Mo. 112; Dudley, 346. On the trial of a nuisance, the prosecution need not prove a criminal intent—6 Parker Cr. R. 347; see 105 Mass. 58; 7 Allen, 573; 12 *id.* 173.

The prosecution must prove the location as alleged—42 Ind. 161; 15 Rich. 310; 63 Ill. 185; 18 Vt. 70. Evidence to show the condition of the premises after finding the indictment, is not admissible—6 Parker Cr. R. 347. An indictment for horse-racing on a public road is sustained by proof of racing with mules—1 Head, 154. It is not competent for defendant to prove that the public benefit resulting from his acts is equal to the public inconvenience—35 Iowa, 221; nor that defendant acted as agent for another—5 Port. 365; or, that the dwelling-houses were erected after the erection of the alleged nuisance—7 Blackf. 534; or, that it existed for such length of time as to establish a prescription—1 Denio, 524; 1 Whart. 469.

Rape.—It need not be proved that the force employed was such as to create a reasonable apprehension of death—40 Ala. 325. The testimony of medical experts as to the effect of indecent liberties upon the mind of the female, is inadmissible. Such acts are to be classed under the head of solicitations—53 Cal. 64. Because acts not amounting to rape are shown at one time, it does not prohibit proving the offense at another—32 Cal. 68. Testimony to prove that defendant had beaten and harshly used the prosecutrix at various times, is inadmissible—33 Cal. 522. Evidence of declarations of defendant concerning his misconduct with females other than the prosecutrix is not admissible—49 Cal. 654; 45 id. 570.

When the party injured is a witness, it is admissible to prove that she made complaint while the injury was recent—18 Ala. 521; 45 id. 80; 1 Denio, 19; 11 Ga. 225; 55 id. 303; 46 Miss. 274; 61 Mo. 232; 41 N. Y. 265; 17 Ohio, 593; 18 id. 99; 23 Ohio St. 394; 47 Vt. 82; 2 Wheel. C. C. 42. Delay, when accounted for, will not exclude statements made by the injured party as part of the *res gestæ*—45 N. H. 149; 47 Vt. 82; see Phill. (N. C.) 49; 8 Jones (N. C.) 19; see 8 Conn. 93; 8 Ohio St. 643; 18 Ohio, 99; 14 La. An. 521; 9 Humph. 246; but such evidence is admissible merely in corroboration—58 N. Y. 377; 8 Jones (N. C.) 19; 40 Tex. 160. Conviction for rape cannot be on the uncorroborated evidence of the prosecutrix—51 Cal. 372; 46 id. 543; 6 id. 221; 44 Iowa, 82; and when corroborative testimony can be procured, non-production will work against the prosecution—22 Ill. 160.

Lewdness of the prosecutrix with others is admissible for the defense when she is the only witness—6 Cal. 221; see 24 Mich. 1. The credibility of the prosecutrix as sole witness is for the jury—52 Ala. 235. To meet the question of assent, it may be shown that she was a common prostitute, or of loose character—58 Ind. 355; and her reputation for chastity may be attacked—15 Ark. 624; 3 Ga. 417; 6 Ired. 305; 5 Jones (N. C.) 65; 113 Mass. 210; 69 Ill. 56; 43 N. H. 89; 45 id. 148; 19 Wend. 192; 55 N. Y. 515; 8 Ohio St. 643; 13 id. 332; but this reputation must have existed *before* the act on trial—43 N. H. 89. She may be compelled to answer questions as to her prior connections with the defendant—6 Cal. 221; 15 Ark. 624; 6 Ired. 305; 43 N. H. 89; 45 id. 148; 19 Wend. 192. Her testimony denying such intercourse may be contradicted—6 Cal. 221; 7 Hun, 171; 24 Mich. 1. If defendant introduces testimony to impeach the character of prosecutrix, the prosecution may introduce testimony to support her general character for chastity—36 Cal. 522.

Receiving stolen property.—It must be proved that the goods were stolen—13 Ired. 338; 37 Mo. 58; but it is not necessary to prove who stole the goods—43 Cal. 196; 11 Gray, 60; 21 Wend. 86; 9 Ala. 845. To show a guilty knowledge, other instances of receiving may be proved—41 Ala. 405; 3 Met. (Ky.) 417; 3 Parker Cr. R. 335; 23 Ohio St. 330; unless there is a marked difference in time and character in the receptions—55 N. Y. 81; 58 id. 555. Guilty knowledge may be shown by evidence of the principal felon, supported by corroborating evidence—10 Cush. 535. It is sufficient to prove a control over the goods by the receiver—19 Iowa, 144; 1 Const. (S. C.) 274. If the charge be joint,

proof that the goods were found in their joint possession may give an inference which will convict of a joint act of receiving—9 Conn. 527; 7 Vt. 118. When goods shown to have been stolen, are retained by a party, under suspicious circumstances, the burden rests on him to show how he came by them—9 Conn. 527; 7 Vt. 118; but mere possession of stolen goods will not, of itself, sustain a conviction—48 Iowa, 172; 13 Mich. 351; see *ante*, § 1102, note. Bare possession of stolen goods is not sufficient corroboration of the testimony of the thief—10 Cush. 535; 13 Mich. 351. The place of reception, like the place of stealing, may be inferred from all the circumstances of the case—3 Parker Cr. R. 473; see 2 Blackf. 103; 6 Ala. 845.

Robbery.—The property as described in the indictment must be proved as laid—5 Lans. 340. The person robbed is a competent witness to prove he was terrified—12 Ga. 293. It is not necessary to prove actual fear—12 Ga. 293. The facts that the prisoner used violence towards him on the night of the robbery, and that a part of the stolen property was found in prisoner's possession, are sufficient evidence of guilt—3 Keyes, 9. Where the robbery was charged on a highway, proof that it was near the highway is not sufficient—7 Ired. 239. A statement by the prosecutor that he had been robbed, made a few minutes after the crime was committed, is admissible as part of the *res gestæ*—5 Nev. 99; 29 Mich. 71; 74 N. C. 351. Evidence is not admissible for the purpose of showing that defendant entered into an agreement to commit another and different robbery—32 Cal. 81. Where the defendant claims to have been elsewhere at the time of the robbery, any circumstances which will tend to fix the time he was at such other place is admissible in evidence—32 Cal. 100. Where the prisoner promised to point out where the money was buried, and afterwards pointed out the place at which it was found, his statement in connection with said fact and proof of other witnesses was admissible against him—34 Cal. 177. On a trial of four persons for robbery, it is competent for the prosecution to prove that one of them attempted to escape, as tending to show that he might have disposed of the stolen money—48 Cal. 277. Concert of action may be shown by circumstances—39 Ala. 457. Proof of either violence, or putting in fear, is sufficient—73 N. C. 83. The question whether or not a felonious intent has been proved, is to be determined by the jury—6 Parker Cr. R. 642. It is the province of the jury to determine from the acts of the defendant and from all surrounding circumstances, whether the defendant intended to commit the robbery, or was actuated by some other purpose—48 Cal. 82; see *ante*, §§ 211–213.

Seduction.—The seduced female is competent to prove that the promise of marriage was the inducement to the illicit intercourse—26 N. Y. 203; see 55 id. 644; and a mutual promise is implied—55 id. 644. It is only necessary that she should be corroborated as to the facts constituting the crime, and not as to her previous chaste character—26 N. Y. 203; 55 id. 644; but see 4 Minn. 325. The defendant cannot be allowed to prove that her general reputation for morality and virtue is bad—27 Mich. 134; 5 Parker Cr. R. 254; 26 N. Y. 203; 1 Parker, 471. He must prove specific acts—5 Parker Cr. R. 254. It is not necessary, in order to establish her unchaste character, to prove that she had been previously guilty of sexual intercourse, but only to show that she was lewd in her behavior—5 Iowa, 389; 5 Parker Cr. R. 108; but in the absence of proof to the contrary, her chastity will be presumed—5 Iowa, 389; see id. 430; 32 id. 262. She may be interrogated in her cross-examination as to prior unchaste acts with men other than the defendant—30 Iowa, 570. The defendant has a right to contradict her testimony either directly or by facts, from which the jury might infer intercourse with others—5 Parker Cr. R. 180. Habits of life pursued by her, exhibiting moral turpitude, would be a reason for disbelieving her testimony—43 Ga. 192. So her admissions may be used as impeaching testimony where the proper foundation has been laid—27 Mich. 134.

The prosecution may prove that she had a good character for chastity, was correct and modest in deportment, and that up to the time of the occurrence with the defendant, she was considered virtuous—32 Iowa, 88. Where nothing appears to the contrary, defendant will be deemed to have been of full age, so far as may affect his promise—26 N. Y. 203.

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein. [In effect April 9th, 1880.]

Treason.—After an overt act has been proved in the county where the indictment is found, evidence may be given of overt acts in another county—1 Dall. 33. The felonious act for which defendant is held on another indictment, is not admissible in evidence—2 Dall. 348. Where two persons are separately indicted, one is a competent witness for the other—2 Wall. Jr. 139. The language of the prisoner showing his intention, is admissible on the question of motive—1 Dall. 33; see id. 39; 2 id. 88. Proof that, a city being in possession of the insurgents, defendant had authority to grant passes, is competent evidence that he held a commission under the enemy—1 Dall. 35. That two witnesses are required to prove treason, refers to the proof on the trial, and not to the proceedings before the grand jury, or to preliminary investigations—2 Wall. Jr. 138; 4 Cranch, 469; 1 Burr. Tri. 196; 4 Phila. 396; but see 2 Whart. St. Tri. 480; see Fed. Const. art. III, § 3, subd. 1.

Treason.—See Const. Prov. and note, *ante*, p. 18.

1104. Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence. [In effect April 9th, 1880.]

Conspiracy.—The fact of conspiracy may be inferred from facts and circumstances—3 Dill. 681; 14 Blatchf. 381; 5 McLean, 513; 55 N. Y. 386; 48 Md. 321; and one witness will suffice to prove co-operation of any individual conspirator—10 Pick. 497; see 6 Mass. 72. The conspiracy being proved, the jury are to give the same weight to the declarations of a co-conspirator, not on trial, as if he were on trial—49 Cal. 650.

1105. Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed

only amounts to manslaughter, or that the defendant was justifiable or excusable.

Burden of proof.—The law presumes an unlawful intent primarily, and the defense must show justification or other excuse—29 Cal. 678. A person is presumed to intend the ordinary consequences of his acts, and the burden is on him to rebut the presumption—1 Parker Cr. R. 252; see 1 Kan. 340. When the matter of defense is wholly disconnected from the body of the crime charged, the burden of proof is on the defendant—33 Ind. 270. So, where the subject-matter of a negative averment relates to the defendant personally, or is peculiarly within his knowledge—34 N. H. 422. So, where a conspiracy is proved, and one of the conspirators was in a situation in which he might have given aid to the perpetrator of the homicide, the burden is on him to rebut the presumption—9 Cal. 496. Where homicide is proved, it rests on the defendant to show justification, excuse, or circumstances of mitigation—17 Cal. 283; subject to the qualification that the benefit of the doubt is to be given to the prisoner—15 Cal. 476. Where a mortal wound is inflicted with a deadly weapon, on slight provocation, the burden of proof is on the defendant to show the want of deliberation and premeditation—2 Gratt. 594; see 8 Humph. 671; 2 Id. 439.

1106. Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; and when the second marriage took place out of this State, proof of that fact, accompanied with proof of cohabitation thereafter in this State, is sufficient to sustain the charge.

Bigamy.—By international law marriages may be proved by parole—121 Mass. 61; 50 Ga. 150; 3 Rich. 434; 54 Ala. 131. Admissions are admissible in proof of marriage, when not excluded by the *lex fori*—7 Me. 57; 19 Id. 155; 44 Id. 469; 121 Mass. 61; 1 Har. (N. J.) 380; 1 Ashm. 272; 16 Ohio, 173; 12 Ohio St. 553; 16 Ind. 352; 46 Id. 459; 30 Iowa, 582; 2 Va. Cas. 95; 17 Gratt. 582; 3 Rich. 434; 4 McCord, 256; 11 Ga. 53; 14 Ala. 546; 30 Id. 536; 54 Id. 131; 6 Bush, 309; 11 Id. 679; 23 Tex. 646; but where the admission is not incidental to cohabitation, and there is no proof of marriage *aliunde*, such admission is not enough to prove marriage—15 Mass. 163; 6 Conn. 446; 1 Parker Cr. R. 378; 3 Helsk. 348; 25 Wis. 379; see 11 Bush, 679; 54 Ala. 131; 121 Mass. 61. A duly certified copy of the registry, sustained by proof of the foreign law, is the best evidence of a foreign marriage—40 Conn. 145; if a registry is required by the foreign law—21 Gratt. 800; but the testimony of witnesses may be substituted for this—10 N. H. 347; 54 Id. 456; 1 Pick. 136; 64 N. Y. 456; 2 Va. Cas. 95; 16 Ohio, 173; 50 Ga. 150; 53 Id. 574; 52 Ala. 338. When the first marriage is proved, the second wife may be a witness—2 Ired. 346; 3 Head, 544; 12 Minn. 476; 14 Up. Can. Q. B. 588. See *ante*, § 281.

1107. Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any such forged bill or note, it is not necessary to prove the incorporation of such

bank or company by the charter or act of incorporation, but it may be proved by general reputation; and persons of skill are competent witnesses to prove that such bill or note is forged or counterfeited.

Forgery and counterfeiting.—Each court takes notice of the statutes of its particular legislature, and each jury takes notice of them as a matter of fact—2 Pick. 47; 18 Ohio St. 236; 5 Sneed, 493. It is competent to prove by reputation the existence and incorporation of a banking company—41 Cal. 653; 28 Id. 507; 29 Id. 257; see 11 Wheat. 392; 21 Wend. 309; 25 Id. 472; 1 Parker Cr. R. 469; 15 Ohio, 217; 13 Id. 458; 10 Gratt. 776; but see 1 Spenc. 401; 5 Sneed, 346; 8 Wis. 352; 7 Iowa, 242. A forged instrument, though unstamped, may be used in evidence against the defendant—28 Cal. 514. Other instruments claimed to have been forged at the same time may be used in evidence to prove guilty knowledge—28 Cal. 514. It is not necessary that the intent to fill up unfinished notes should be proved by an attempt to do so. Possession, with knowledge of the purpose for which they are designed, is sufficient—41 Cal. 656. No precise rule can be laid down with regard to the distance of time between the offense charged and the occurrence of collateral facts offered in evidence to prove guilty knowledge—28 Cal. 517. Letters from A. to B., written under instructions of defendant, tending to prove that defendant knew that the money belonged to A., and was not paid over except upon presentation of a genuine receipt, were admissible in evidence—3 Pac. C. L. J. 938. Where hearsay evidence was admitted without objection, the admission of counterfeit bills referred to in the hearsay statement was properly rejected—5 Parker Cr. R. 217. The rule as to corroboration of the testimony of an accomplice does not apply to a feigned accomplice—30 Cal. 317. For the crime of knowingly having in his possession counterfeiting implements, it is competent, in order to show criminal intent, for the prosecution to prove that defendant had counterfeit money also in his possession. Evidence that he had counterfeit coin in his possession, and that he sold such coin to another, is sufficient to convict of possession of counterfeit coin—30 Cal. 317. See *ante*, § 470.

1108. Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of twenty-five years, for the purpose of prostitution, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence.

Abortion.—The woman on whom the abortion has been performed is a competent witness against the defendant—39 Cal. 393; 11 Gray, 86; 9 R. I. 361; see 116 Mass. 343; 29 N. Y. 523; 39 N. J. L. 598; 72 Ill. 37; and it is not admissible to cross-examine her as to her illicit intercourse with third parties—11 Gray, 86. Where the only evidence is the testimony of the woman, it must be corroborated in respect to some of the material facts which constitute the necessary element of the offense—39 Cal. 398. Any evidence, in addition to that of the woman, tending to show a criminal intent, would be sufficient corroboration—39 Cal. 398. It is competent to prove by the prosecutrix not only the fact

of pregnancy, but all circumstances tending to show it—39 Cal. 393. Although the testimony of a witness was improperly admitted, yet as it was not objected to, the prosecution might prove that deceased was not in her right mind when she made the declarations testified to—3 Parker Cr. R. 569. Evidence of procuring an abortion on another than the prosecutrix is inadmissible—6 Lans. 462; 63 Barb. 634.

1109. Upon a trial for the violation of any of the provisions of chapter nine, title nine, part one of this Code, it is not necessary to prove the existence of any lottery in which any lottery ticket purports to have been issued, or to prove the actual signing of any such ticket or share, or pretended ticket or share, of any pretended lottery, nor that any lottery ticket, share, or interest was signed or issued by the authority of any manager, or of any person assuming to have authority as manager; but in all cases proof of the sale, furnishing, bartering, or procuring of any ticket, share, or interest therein, or of any instrument purporting to be a ticket, or part or share of any such ticket, is evidence that such share or interest was signed and issued according to the purport thereof.

1110. Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any money, personal property, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof, be in writing, subscribed by or in the handwriting of the defendant, or unless the pretense be proven by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying, or receiving any money or property.

False pretenses.—The burden of proof is on the prosecution to show the pretenses were false, unless the fact lies peculiarly within the knowledge of the accused—41 Miss. 570. It is competent for the plaintiff to testify that he relied on the representations of the prisoner—5 Parker Cr. R. 142. Although when all of the pretenses charged are a substantive part of the offense, all must be proved to be false,

yet it is otherwise where one or more are sufficient *per se* to constitute the offense—34 N. Y. 351; 11 Wend. 557; 9 N. H. 31; see 5 Thomp. & C. 277. A variance between the indictment and the proof, in the name of the party defrauded, is fatal—33 Tex. 102; 7 Allen, 548. So, a variance in the amount which a party represented himself to be worth is a material variance—51 Ind. 514; 30 Ala. 9; 1 Cush. 33; see 13 Wend. 87. So, a variance in the description of the property obtained by the false pretense is material—20 Wis. 217; 4 Met. 43; 15 Gray, 189. Evidence that the false pretenses were made to a clerk or agent of the owner is sufficient—7 Met. 462; and see Thach. C. C. 410.

The testimony of a vendor is admissible to show to whom he gave credit—7 Allen, 548; see 115 Mass. 431. Evidence that at the time of the false pretenses the defendant was insolvent, is admissible to show fraudulent intent—7 Allen, 548; and the conduct and acts of the defendant are competent evidence—9 Gray, 121; 5 Parker Cr. R. 142; 48 N. H. 126. On a trial for obtaining by false pretenses a signature to an instrument, the right of defendant to show his ability to pay must be confined to the time when the signature was obtained—13 Wend. 87. The materiality and influence of the false pretense is a question for the jury, unless some inducing circumstance upon the face of the indictment shows that the pretense was immaterial—34 N. Y. 351. In determining the criminality, the jury may take into consideration the ability or capacity of the party defrauded to detect them—14 Ill. 348.

1111. A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof.

Corroborative evidence.—A conviction cannot be had upon the uncorroborated testimony of an accomplice—53 Cal. 607; 39 Id. 403; Id. 614; 1 Wheel. C. C. 418; 5 Iowa, 465; 11 Id. 347; 34 Tex. 133; 34 Iowa, 443; see 2 Bond, 311; Id. 323; 5 Gray, 80; 3 McLean, 431. *Contra*, 1 Denio, 85; 5 Parker Cr. R. 119; Id. 351; 55 Barb. 450; 56 Id. 126; 21 N. Y. 578; 5 Mich. 305; 26 Ill. 344; 21 Conn. 272; 4 Ind. 128; 7 Id. 326; see 4 Parker Cr. R. 662; 29 Conn. 463; 20 La. An. 145; 25 Id. 522; 43 Ga. 197; 51 Id. 597; 40 Ala. 634; 3 Kan. 450; 25 Ark. 92; 1 Iowa, 316; 10 Iowa St. 267. So, of a woman upon whom an attempt of abortion had been made—39 Cal. 403. When an accomplice testifies, he cannot shield himself from full disclosure of his connection with the offense—18 Mich. 266; but he is not obliged to disclose his criminality in other offenses—16 Mich. 142. He is not to be discredited merely from the fact of his being an accomplice—Bald. 22. The jury is the exclusive judge of his credibility—53 Cal. 602. The corroborative evidence must of itself, without the testimony of the accomplice, tend to connect defendant with the commission of the offense—50 Cal. 480; 39 Id. 403; 16 Id. 110; 29 Id. 622; 39 Id. 343; 21 Wend. 313; 1 Denio, 87. It need not be evidence tending to establish the precise facts testified to by the accomplice—50 Cal. 450. It may be slight, and entitled to little consideration, yet, if there be *any*, which of itself tends to convict, it is sufficient—39 Cal. 616; see 30 Id. 316; but it is otherwise with a feigned accomplice—30 Id. 316.

A detective is not an accomplice—36 Iowa, 343. Whether a person is an accomplice, is a question for the jury—19 Iowa, 169; 36 Id. 343. A corroboration, to be of any avail, should be to some matter material

to the issue—54 Barb. 306. Any evidence tending to show a criminal intent on the part of defendant, would be sufficient corroboration of her testimony—39 Cal. 403. Admissions made by the prisoner which tend strongly to connect him with the larceny, are sufficient corroboration of the testimony of an accomplice—49 Cal. 580. The statement of the prisoner to the officer, that the accomplice had nothing to do with the offense, is a sufficient corroboration of the testimony of the accomplice—12 Allen, 183; see 110 Mass. 104.

Statements of an accomplice, not given as testimony, nor made in presence of the defendant, nor during the pendency of the criminal enterprise and in furtherance of its object, are not competent—45 Cal. 20. Proof that stolen property was found next day after the theft on the person of accused, is sufficient corroborating evidence—39 Cal. 614. If the prosecution prove the larceny by an accomplice, further proof that next morning the prisoner received the horse from the person who stole it, and immediately removed it to another place for pasture, giving an assumed name, is sufficient corroboration—49 Cal. 580. Where an accomplice, on cross-examination, testified that the magistrate told him he should not be prosecuted if he would disclose all he knew, the testimony of the magistrate is admissible to corroborate his evidence—22 Pick. 397. The testimony of an accomplice cannot be corroborated by that of another accomplice—4 Greene, 65.

1112. Repealed. [In effect March 12th, 1880.]

1113. The court may direct the jury to be discharged where it appears that it has not jurisdiction of the offense, or that the facts charged do not constitute an offense punishable by law. [In effect April 9th, 1880.]

1114. If the jury be discharged because the court has not jurisdiction of the offense charged, and it appear that it was committed out of the jurisdiction of this State, the defendant must be discharged. [In effect April 9th, 1880.]

1115. If the offense was committed within the exclusive jurisdiction of another county of this State, the court must direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county for his arrest; or if the offense is a misdemeanor only, it may admit him to bail in an undertaking, with sufficient sureties, that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county; and, if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly specified in the undertaking, to surrender himself upon the warrant, if issued, or that his bail will forfeit such sum as the court may fix, to be mentioned in the

undertaking; and the clerk must forthwith transmit a certified copy of the indictment or information, and of all the papers filed in the action, to the district attorney of the proper county, the expense of which transmission is chargeable to that county. [In effect April 9th, 1880.]

Where a party is guilty of receiving stolen property brought from another county, with guilty knowledge of the theft, he cannot be prosecuted for larceny in the county where he resides—40 Cal. 601; and see id. 648.

1116. If the defendant is not arrested on a warrant from the proper county, as provided in section one thousand one hundred and fifteen, he must be discharged from custody, or his bail in the action is exonerated, or money deposited instead of bail must be refunded, as the case may be, and the sureties in the undertaking, as mentioned in that section, must be discharged. If he is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate.

1117. If the jury is discharged because the facts as charged do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged; or if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the money be refunded to him, unless in its opinion a new indictment or information can be framed, upon which the defendant can be legally convicted, in which case it may direct the district attorney to file a new information, or (if the defendant has not been committed by a magistrate) direct that the case be submitted to the same or another grand jury; and the same proceedings must be had thereon as are prescribed in section nine hundred and ninety-eight; *provided*, that after such order or submission the defendant may be examined before a magistrate, and discharged or committed by him as in other cases. [In effect April 9th, 1880.]

1118. If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a con-

viction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice.

See 38 Cal. 473.

1119. When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of the sheriff, to the place, which must be shown to them by a person appointed by the court for that purpose; and the sheriff must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

View of premises.—No person can be allowed to talk to the jury during their viewing the place where the crime was committed—33 Cal. 61. Visiting the scene of the *res gestæ* by a part of the jury after the case is committed to them is ground for a new trial—14 N. Y. 563; 18 id. 179; 3 Parker Cr. R. 25; otherwise if it be merely casually—64 Md. 368; 20 Kan. 311.

1120. If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties.

1121. The jurors sworn to try an action may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. The officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof. [In effect April 9th, 1890.]

An order of court made by consent of defendant, authorizing a sheriff to receive from the jury a sealed verdict, and on its receipt to allow the jury to separate until the session of the court on the follow-

ing morning, is not an error of which defendant can complain—45 Cal. 357.

1122. The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves, or with any one else, on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them.

1123. If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case, a new juror may be sworn, and the trial begun anew, or the jury may be discharged, and a new jury then or afterwards impaneled.

1124. The court must decide all questions of law which arise in the course of a trial.

Court to decide questions of law, as, the admissibility of evidence, or, a severance of defendants on the trial—9 Ala. 137; 2 Ashm. 31; 40 Ala. 74; 41 id. 416; 7 Gratt. 619; 25 id. 938; 10 Ind. 453; 39 Me. 78; 1 Lea, 573; 7 R. I. 1; 10 Ohio St. 449; 7 Rich. 412; 13 id. 316; and where any material charge in the indictment is not supported in law, to direct an acquittal—27 La. An. 395; see 16 Kan. 475; 10 Allen, 189; 66 Mo. 208. See *contra*, 75 N. C. 275; 57 Ga. 503; 50 Ala. 154. See 6 Cal. 637; and *post*, § 1127, and note.

1125. On a trial for libel, the jury has the right to determine the law and the fact. [In effect April 9th, 1880.]

1126. On a trial for any other offense than libel, questions of law are to be decided by the court, questions of fact by the jury; and, although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court. [In effect April 9th, 1880.]

Questions of law.—The jury cannot decide on the law, nor can the court submit such questions to them—49 Cal. 56; so, pertinence of evidence cannot be submitted to the jury—49 Cal. 56; nor the applicability of evidence to the issues—49 Cal. 56. In the following States juries are bound by the instructions of the court in matters of law in criminal cases—see 53 Me. 328; id. 548; 18 Ala. 119; 16 N. H. 325; 5 Gray, 186; 7 Mo. 607; 49 Ga. 482. In United States Courts—1 Curt. 23; in

capital cases—14 Rich. 87. In libel—see Const. Cal. art. 1, § 9. See § 1102, and note.

Province of jury.—They must decide without reference to their private knowledge—6 Parker Cr. R. 355. They are to decide as to the credibility of witnesses—22 Pick. 397; see 53 Me. 267. The jury are the exclusive judges of the facts—30 Cal. 214; 11 Gray, 321; 14 Id. 400; 13 Allen, 571; see 50 Pa. St. 319. It is for the jury to determine whether evidence introduced upon a given point amounts to proof of the facts in issue—30 Cal. 151. It is the province of the jury, unaided by the court, to say whether a fact is proved—32 Cal. 213. On the trial for murder the jury have a right to weigh with the other proofs the apparent absence of motive on the part of defendant—17 Cal. 377. The judge cannot express his opinion on the weight of evidence; he may state the evidence and declare the law thereon, or he may state that there is no evidence as to a certain fact—27 Cal. 507.

1127. In charging the jury, the court must state to them all matters of law necessary for their information. Either party may present to the court any written charge, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the court must indorse and sign its decision. If part be given and part refused, the court must distinguish, showing by the indorsement what part of the charge was given and what part refused.

Charge of court.—The court may, by express consent of the defendant, or by mutual consent of parties, charge orally—43 Cal. 384. The presumption is that the charge was in writing unless the contrary appears—17 Cal. 322; 25 Id. 531; 28 Id. 496; see *ante*, § 1093, subd. 6, and note. Where a written charge was expressly waived, an entry that the court charge the jury orally must be construed as a mutual consent to an oral charge—43 Cal. 384. The consent of defendant will not be presumed from his absence, or from his failure to object—43 Cal. 29. In a charge of burglary, an instruction that the possession of property recently stolen is evidence of guilt, is error, as charging a matter of fact, in violation of the Constitution—55 Cal. 236; 54 Id. 151; 45 Id. 285; see *ante*, page 21. If a judge, in his charge, undertakes to state a portion of the testimony in language which is in substance and effect a repetition of the testimony, the defendant cannot complain—48 Cal. 91. In its charge, the court must not assume a fact to have been proved—14 Cal. 438. The existence of a fact may tend to prove another fact—52 Cal. 315; but the court cannot charge to this effect—52 Cal. 315; 51 Id. 589; but one fact cannot be inferred from another, where a legal presumption does not exist—54 Cal. 63; 51 Id. 588; 53 Id. 315; so, the fact of abandonment cannot be charged from the existence of other facts—52 Cal. 315. Where there was some evidence, however slight, tending to prove the complicity, it is error to charge that there was no evidence of that fact—53 Cal. 604. It is not sufficient if it merely tends to raise a suspicion of the guilt of accused—30 Cal. 481, commenting on 39 Cal. 404. If there be substantial conflict in the evidence as to a material fact, and if in its charge the court assumes the fact as proved, it is error—53 Cal. 612; 49 Id. 166; 32 Id. 213; 39 Id. 151; 17 Id. 147; 16 Id. 137; Id. 98. In the Chinese game of "Tan," where the evidence tended to prove that defendants were severally engaged

in distinct transactions, to charge the jury that there might be one game conducted by two dealers at the same time, is error—6 Pac. C. L. J. 556. If there is no evidence to prove an act manslaughter or excusable homicide, it is not error to charge that if K. was intentionally, willfully, deliberately, and premeditatedly killed, it is murder in the first degree, otherwise it is in the second degree—49 Cal. 180. The charge must be taken together. It is not necessary to insert in each separate instruction all the exceptions, limitations, and conditions which are inserted in the charge, taken as a whole—49 Cal. 182; 48 Id. 93; it forms no part of the judgment roll—44 Cal. 598.

Instructions.—The defendant has a right to a full statement of the law from the court—39 Ala. 684; 43 Id. 340; 50 Id. 117; 3 Cold. 339; Id. 344; 5 Id. 300; 32 Ga. 515; 35 Id. 241; 39 Id. 684; 1 Idaho, 75; 42 Mo. 242; 64 Id. 191; 22 Ind. 247; 25 Iowa, 572; 32 Vt. 491. Instructions deemed necessary either from the course of the argument or to prevent injustice, may be given by the court, or those already given may be explained—18 Cal. 636. The court is not forced to adopt the language in which counsel may couch instructions prayed for, but may recast, and submit them in his own terms—49 Cal. 578; 30 Id. 450; 1 Colo. 514; 12 Ga. 293; 8 Iowa, 407; 19 Id. 169; 36 Miss. 77; 3 Ind. 226; 4 Jones (N. C.) 440; 36 Mo. 592; 9 Smedes & M. 284; 84 Pa. St. 158; nor is it bound, if an instruction asked for is partly correct and partly erroneous, to either affirm or repudiate it as a whole—13 Ark. 318; 13 Fla. 636; 8 Iowa, 407; 40 Ill. 488; 118 Mass. 1; 62 Mo. 596; 51 Me. 267; 10 Smedes & M. 192. The court may modify or add to an instruction asked, provided the law material to the case is clearly and correctly given—30 Cal. 450; 32 Id. 288; 25 Id. 460; 47 Id. 96; but a verbal modification of a written instruction is erroneous—8 Id. 341.

Instructions must be supported by the evidence—6 Pac. C. L. J. 556. There can be no instruction unless there is some evidence to which it applies, on some rational theory, logically deduced from such evidence—1 Cal. 365; 6 Id. 217; 15 Id. 482; 24 Id. 28; 27 Id. 514; 30 Id. 207; 32 Id. 204; 39 Id. 691. They must always be given with reference to the facts proved—15 Cal. 477; 24 Id. 18; 27 Id. 509; 30 Id. 207. The court properly refuses to submit a point to the jury, on which there is no evidence—41 Cal. 237. Where instructions asked have no application to the case, they may be refused—6 Cal. 214; 28 Id. 282. An erroneous instruction is not cured by a correct statement of the law in another part of the charge—54 Cal. 154.

If there is any evidence to show a state of facts which would justify the killing or reduce it to manslaughter, it is error to instruct that the burden of proof is on the prisoner, to disprove guilt by preponderating evidence—49 Cal. 611. It is error to instruct that if they find a verdict of guilty they must convict the defendant of the offense charged in the indictment—53 Cal. 263. The intention is a material fact to be found by the jury—53 Cal. 263. If the instructions have already been substantially given, the court may refuse to give them—28 Cal. 423; 30 Id. 155; although it is better for the court to give them—27 Cal. 515; 30 Id. 155. Unless clearly covered by those already given, an instruction should not be refused—32 Cal. 436; see 27 Id. 515; 32 Id. 282. When instructions are refused because similar instructions have been already given, the ground of the refusal must be stated in the hearing of the jury—8 Cal. 390; see 13 Id. 173; 27 Id. 514; 17 Id. 148; but such instruction must be free from objection, neither ambiguous nor obscure, nor calculated to mislead or confuse the jury—17 Cal. 430.

The court may instruct as to what amounts to deliberation—43 Cal. 351; and that in deliberating there need be no appreciable time between the intent and the act—43 Id. 352; 34 Id. 211. It may instruct that testimony has been introduced tending to prove certain matter, and such instruction is not an expression of opinion as to the weight or effect of the evidence, nor as to what fact has been proved—49 Cal.

562. An instruction upon a trial for an assault with intent to kill, to the effect that evidence of drunkenness on the part of defendant, while clearly admissible under the law, should be received with great caution, is not erroneous—55 Cal. 592; see 43 id. 344. An instruction that if the jury "believe any witness had sworn upon the stand willfully, surreptitiously, and falsely, in respect to any matter material to the issue, they should disregard his testimony altogether," properly refused—53 Cal. 354.

A failure to instruct the jury that statements made to the prisoner are not admissible to prove their truth, is not erroneous, unless requested to be given—53 Cal. 613; 33 id. 98; 48 id. 278; 49 id. 173. Contradictory instructions are not to be tolerated—43 Cal. 552. To arrive at the meaning of an instruction, all the instructions on the same point must be considered—55 Cal. 201. An erroneous instruction is cured by another instruction, whereby a jury was prevented from being misled by the error—55 Cal. 202. As to oral instructions—see *ante*, § 1093, subd. 6, note; § 1176.

1128. After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, an officer must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.

1129. When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court, and he must be committed and held in custody accordingly.

1130. If the district attorney fails to attend at the trial, the court must appoint some attorney-at-law to perform the duties of the district attorney on such trial.

1131. Upon a trial for larceny or embezzlement of money, bank-notes, certificates of stock, or valuable securities, the allegation of the indictment or information, so far as regards the description of the property, is sustained, if the offender be proved to have embezzled or stolen any money, bank-notes, certificates of stock, or valuable security, although the particular species of coin

or other money, or the number, denomination, or kind of bank-notes, certificates of stock, or valuable security, be not proved; and upon a trial for embezzlement, if the offender be proved to have embezzled any piece of coin or other money, any bank-note, certificate of stock, or valuable security, although such piece of coin or other money, or such bank-note, certificate of stock, or valuable security, may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly. [In effect April 9th, 1880.]

CHAPTER III.

CONDUCT OF THE JURY AFTER THE CAUSE IS SUBMITTED TO THEM.

- § 1135. Room, etc., for jury after retirement.
- § 1136. Accommodations for jury when kept together.
- § 1137. What papers the jury may take with them.
- § 1138. After retirement, may return into court for information.
- § 1139. If juror after retirement become sick, etc.
- § 1140. Not to be discharged unless there is no probability that they can agree.
- § 1141. When discharged without verdict, cause to be again tried.
- § 1142. Court may adjourn during absence, but deemed open.
- § 1143. Final adjournment discharges jury. [Repealed.]

1135. A room must be provided by the supervisors of each county for the use of the jury, upon their retirement for deliberation, with suitable furniture, fuel, lights, and stationery. If the supervisors neglect, the court may order the sheriff to do so, and the expenses incurred by him in carrying the order into effect, when certified by the court, are a county charge.

Necessaries to be furnished.—It is the duty of the court to see that the jury is provided with medicine and other conveniences or necessities—55 Ga. 696; see Pol. Code, § 4344, subd. 3.

1136. While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they must be provided by the sheriff, at the expense of the county, with suitable and sufficient food and lodging.

1137. Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take

with them the written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person.

What jury may take.—The jury are entitled to take out with them such papers and instruments of evidence as have been admitted in the case—61 Ill. 365; but if others are taken, and which lead to a conviction, it will be cause for setting aside the verdict—10 Allen, 184; 16 Ark. 568; 1 Idaho, 114; 6 Mass. 406; 38 Ill. 527; 4 Wash. C. C. 148; 3 Johns. 252; 2 Yeates, 273; 20 Kans. 643; 10 Rich. 212; 5 Ben. 238; 34 Leg. Int. 204. It is error, in a criminal case, to permit the jury, on retiring, to take with them instructions refused by the court; but if such refused instructions are asked by, and favorable to, the defendant, the fact that the jury takes them cannot prejudice him—6 Pac. C. L. J. 938.

Return for information.—After retiring, the jury may return into court for information—53 Cal. 575. This section does not authorize an oral charge—53 Cal. 575; see *ante*, § 1093, subd. 6 and note. It is a fatal error for a jury to return into court and receive instructions in the absence of defendant's attorney, or without proof of notice to him of their return—37 Cal. 278.

1138. After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney and the defendant or his counsel, or after they have been called. [Approved March 30th, in effect July 1st, 1874.]

1139. If, after the retirement of the jury, one of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept for deliberation, the jury may be discharged.

Discharge of jury.—A discharge of a jury from sickness or any other accident, is not a bar to further prosecution for the same offense—41 Cal. 215; 48 id. 326. The discretion of the court to discharge the jury must be exercised upon some kind of evidence, and the judgment on the point should be expressed in some form on the record—48 Cal. 327; see *ante*, § 1017, subd. 4 and note.

1140. Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless at the expiration of such

time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

Discharge by consent.—If the jury is discharged with the consent of the defendant, because unable to agree, it is not an acquittal of defendant—41 Cal. 214; and the prisoner is not entitled to discharge on habeas corpus in such a case—41 Cal. 219. In case of failure of the jury to agree, the proper course is to call them into court and have them announce their inability to agree, and then discharge them—48 Cal. 334. The jury may be discharged without rendering a verdict, on consent of both parties—38 Cal. 475. See *ante*, § 1017, subd. 4, note.

1141. In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried. [In effect April 9th, 1880.]

See 41 Cal. 215; and see *post*, § 1181.

1142. While the jury are absent, the court may adjourn from time to time, as to other business, but it must nevertheless be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged.

Adjournment.—A district judge may adjourn a general term in one county over an intervening term in another county, and the term so adjourned is a continuation of the regular term—42 Cal. 19.

1143. Repealed. [In effect March 12th, 1880.]

CHAPTER IV.

THE VERDICT.

- § 1147. Return of jury.
- § 1148. Appearance of defendant.
- § 1149. Manner of taking verdict.
- § 1150. Verdict may be general or special.
- § 1151. General verdict.
- § 1152. Special verdict.
- § 1153. Special verdict, how rendered.
- § 1154. Form of special verdict.
- § 1155. Judgment on special verdict.
- § 1156. When special verdict defective, new trial to be ordered.
- § 1157. Jury to find degree of crime.
- § 1158. Jury may find upon charge of previous conviction.
- § 1159. Jury may convict of lesser offense, or of attempt.
- § 1160. Verdict as to some defendants, new trial as to others.
- § 1161. Court may direct a reconsideration of the verdict.
- § 1162. When judgment may be given on informal verdict.
- § 1163. Polling the jury.
- § 1164. Recording the verdict.
- § 1165. Defendant, when to be discharged.
- § 1166. Proceedings upon conviction or special verdict.
- § 1167. Proceedings on acquittal on ground of insanity.

1147. When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that case the action may be again tried at the same or another term.

Return of jurors into court.—Irregularity in not first calling over their names, does not prejudice the defendant, if the jurors are all present and had agreed—44 Cal. 542.

1148. If charged with a felony, the defendant must, before the verdict is received, appear in person. If for a misdemeanor, the verdict may be rendered in his absence. [In effect April 9th, 1880.]

Appearance.—At the time of the rendition of the verdict on a charge of felony, the defendant must be present in court—42 Cal. 168; 55 id. 290; 62 Ind. 46; 19 Gratt. 656; 18 Pa. St. 103; 63 id. 386; 2 Sneed, 550; 55 Ga. 521; 49 Miss. 716; 52 id. 391; 6 Pa. St. 385; 69 id. 286; but otherwise as to the necessity of his presence in a case of misdemeanor—23 Cal. 160; 5 Blatchf. 104; see 29 Iowa, 286; 19 N. Y. 549; 25 Pa. St. 221; 16 Vt. 497; 17 Wis. 675; 6 Ired. 164; 14 Mich. 300. That the prisoner was absent, must be proved by defendant—31 Cal. 627; 4 id. 224. If defendant is not present when verdict is rendered, but enters immediately after it, and before the jury is discharged, it will not be held a vital error unless his rights are prejudiced—33 Cal. 99.

1149. When the jury appear, they must be asked by the court, or clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same.

1150. The jury may render a general verdict, or, when they are in doubt as to the legal effect of the facts proved, they may, except upon a trial for libel, find a special verdict. [In effect April 9th, 1880.]

Verdict.—Upon the request of either party, the court should instruct the jury that they have the discretion to render either a general or special verdict—27 Cal. 407. The only verdict in a criminal case that a jury can render under the laws of Louisiana is a general verdict—17 La. An. 71.

1151. A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the indictment. Upon a plea of a former conviction or acquittal of the same offense, it is either "for the people" or "for the defendant." When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be "not guilty by reason of insanity." When the defendant is acquitted on the ground of variance between the indictment and the proof, the verdict must be "not guilty by reason of variance between indictment and proof." [Approved March 30th, in effect July 1st, 1874.]

General verdict.—The verdict "guilty" is assumed to refer to the indictment to which it is a response—39 Ill. 26. When a jury returns a general verdict upon an indictment containing several counts, it will be presumed that they found the prisoner guilty on all—34 Conn. 230; 39 Ill. 164; 1 W. Va. 357; or that the finding was on the good count, where the other count was bad—3 Cliff. 28; 3 McLean, 405; 45 Barb. 494; 55 Ala. 210; 34 Ill. 297; 8 B. Mon. 30; 8 Humph. 118; 3 Helsk. 215; 103 Mass. 214; 17 Pick. 80; 7 Ired. 275; 3 Rich. 337; 14 Smedes & M. 128.

A general verdict will be presumed to have been given on the count to which the testimony applied—7 Jones, (N. C.) 24; see 60 N. C. 364. The verdict need not state on which count it was found—31 Miss. 473; 38 N. Y. 77. It is good if any one of the counts is good—3 McLean, 403; 3 Cliff. 28; 6 Met. 236; 17 Pick. 80; 103 Mass. 214; 45 Barb. 494; 5 Pa. St. 60; 7 Ired. 275; 3 Rich. 337; 55 Ala. 210; 14 Smedes & M. 126; 34 Ill. 297; 8 B. Mon. 30; 8 Humph. 118; 3 Helsk. 215; 21 Mo. 269; 38 Me. 574; 23 Pa. St. 355; 1 Sneed, 511; 34 Ala. 253; 13 Gray, 26; 2 Ohio St. 562; 10 Ga. 47; 3 McLean, 405; 7 Ired. 275; 40 Ala. 684; 8 B. Mon. 30; 1 Parker Cr. R. 246; 28 Mo. 594; 8 Iowa, 477; 48 Me. 218; 42 N. H. 485. A party indicted as principal cannot be convicted on evidence showing that he was accessory before the fact—39 Cal. 175.

A verdict of guilty on one count, saying nothing as to other counts, is equivalent to a verdict of not guilty as to the other counts—Deady, 264; 5 Allen, 514; 7 Blackf. 186; 6 Ala. 200; 9 Leigh, 627; 14 Ind. 530; 56 Id. 101; 64 Id. 498; 65 Id. 445; 5 Ill. 168; 42 Me. 384; 68 Mo. 120; 63 Me. 128; 24 N. Y. 100; 22 Pa. St. 351; 52 Id. 424; 8 Smedes & M. 762; 2 Va. Cas. 235; 30 Wis. 416. A verdict does not cure the defects of an indictment—9 Cal. 30. It is conclusive as to the venue having been proved, when it reads, "guilty as charged in the indictment"—15 Cal. 426.

A verdict acquitting defendant of forging and uttering an indorsement is not an estoppel upon any matter *aliunde*—28 Cal. 507. Finding one guilty who is not named in the indictment is an acquittal of the one named—31 Cal. 451; but when the true name was discovered and used on the trial, it is not a fatal variance—34 Cal. 189. The procedure in rendering a general verdict must be in open court, and in the defendant's presence—19 Ark. 476; 49 Miss. 716; 53 Id. 363; 125 Mass. 203; 16 N. C. 55.

A written general verdict is irregular, and the court may require it to be made orally—125 Mass. 203; 56 Miss. 154; Id. 756; 16 N. H. 325; 62 Ind. 46; but see 19 Ohio St. 579. A general verdict implies that all facts well pleaded are found in manner and form as charged—49 Barb. 122; 39 Ill. 26; 45 Ind. 550; see 17 Ohio St. 294; and the words "as charged in the indictment" are mere surplusage—13 Iowa, 426. Any addition to a general verdict may be regarded as surplusage—34 Cal. 189; 37 Ill. 459; see 2 Va. Cas. 471; 28 Md. 600; 4 Yeates, 441. So, a recommendation to mercy is no part of the verdict, and the court may order it to be recorded without such recommendation—17 Cal. 16; 2 La. An. 27; 51 Ga. 328.

Sealed verdict.—The court may, with the defendant's consent, permit the jury to separate and bring in a sealed verdict—46 Cal. 357; 2 Blackf. 114; 30 Ill. 256; 31 Ind. 492; 116 Mass. 37; 63 Me. 530; 6 McLean, 186; 9 Phila. 592. The defendant is entitled to have the jury present at its rendition—6 McLean, 186; 32 Ill. 485; 11 Ind. 569; 32 Mich. 63.

1152. A special verdict is that by which the jury find the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence, and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them.

Special verdict.—If there is a plea of "not guilty," and a plea of former conviction, the defendant is entitled to a verdict on each plea—51 Cal. 279. If the verdict is "guilty" alone, no judgment of conviction can follow—51 Cal. 279.

1153. The special verdict must be reduced to writing by the jury, or in their presence entered upon the minutes of the court, read to the jury, and agreed to by them, before they are discharged.

Verdict, how rendered.—If the jury is discharged before the verdict is entered, the prisoner ought to be discharged—6 Pac. C. L. J. 65. See *ante*, § 1151; and *post*, § 1181, and notes. If, while the jury is out deliberating, the judge, without calling the jury into court, adjourns the term, it is equivalent to an acquittal—48 Cal. 329. See *ante*, § 1016, note.

1154. The special verdict need not be in any particular form, but is sufficient if it present intelligibly the facts found by the jury.

Form of verdict.—The court should direct the jury to return their verdict in proper form—53 Cal. 627. "We, the jurors, agree that defendant is guilty of murder in the second degree," is good in substance and form—49 Cal. 242. "We, the jury in the case, do find a verdict for manslaughter," is sufficient—49 Cal. 427; 43 Id. 559. An informal verdict is sufficient, if it can be clearly understood as being a general verdict of guilty or not guilty—48 Cal. 559. The verdict must specify the offense, or some offense included within the offense charged, or judgment of conviction will be reversed—53 Cal. 627. The court may amend a verdict in form, so as to meet the requirements of the law, at any time while the jury is before it, and under its control—6 Pac. C. L. J. 323. In a prosecution for embezzlement, the verdict "We, the jury, find defendant guilty, as indicted, to the sum of \$80," though not artistically worded, is sufficient in substance—6 Pac. C. L. J. 968. Where there are several counts, the accurate practice is to find specially on each count—76 Ill. 380.

1155. The court must give judgment upon the special verdict as follows:

1. If the plea is not guilty, and the facts prove the defendant guilty of the offense charged in the indictment, or of any other offense of which he could be convicted under that indictment, judgment must be given accordingly. But if otherwise, judgment of acquittal must be given.

2. If the plea is a former conviction or acquittal of the same offense, the court must give judgment of acquittal or conviction, as the facts prove or fail to prove the former conviction or acquittal.

Judgment.—A judgment of conviction should be certain and final, and subject to no future decision or contingency—1 Blackf. 37. It should state that the plea of the prisoner preceded the selection and swearing of the jury—1 Ala. 655. Dates may be given in figures—24 Ala. 672. The day of the execution of the sentence of death should not be inserted in the judgment, but in the warrant for the execution—38 Cal. 99; 45 Id. 137. A judgment may be erroneous in part, but valid as to the residue—39 Conn. 82; 1 Cowen, 144. A conviction of a lesser

offense is an acquittal of every other offense of a higher grade included in the charge—6 Cal. 543. See *post*, § 1159; *ante*, § 1016, subd. 3.

1156. If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact, from the evidence, as established to their satisfaction, the court must order a new trial.

Defective verdict.—A verdict fatally defective is a nullity—13 W. Va. 859; 21 Pick. 509; 43 Ala. 350. When the verdict is insensible, insufficient, or contrary to the evidence, the practice is to set it aside, and grant a new trial—21 Pick. 509; 21 Iowa, 322; 14 Rich. 203; 15 Serg. & R. 93; see 39 Me. 68; 20 Ohio, 26; 5 Gratt. 663; 38 Miss. 295; 52 Id. 777; but mere clerical errors will not make a verdict insensible—20 Cal. 432; 14 Ga. 8.

Verdict contrary to evidence.—A verdict contrary to the weight of evidence will be set aside—Culp, 356; 12 Conn. 487; 2 Dall. 118; 2 Bail. 565; 42 Ill. 331; 8 Leigh, 726; 2 Nott & McC. 261; 5 Humph. 553; 1 Mo. 417; 5 Pick. 429. In case of arson—12 Conn. 487; for passing altered note—2 Bail. 565; for marking hogs with intent to steal—1 Mo. 417; for receiving stolen goods; on the question of scienter—5 Humph. 553; on a charge of second offense, with no proof of identity of defendant—5 Pick. 429; or, where the *corpus delicti* was not proved—8 Leigh, 726; 12 Minn. 293. If, however, there be conflicting evidence on both sides, and the question be one of doubt, the verdict will generally be permitted to stand—see 60 Cal. 304; 10 Id. 301; 4 Neb. 68; 12 Nev. 300; 1 Blackf. 395; 4 Ind. 540; 45 Id. 157; 3 Iowa, 339; 15 Id. 72; 3 Humph. 289; 10 Id. 144; 2 Bail. 291; 33 Ga. 24; Id. 58; 55 Id. 47; Id. 556; 37 Mo. 343; 4 Yerg. 152; 49 Mo. 343; 13 Ark. 694; 49 Mo. 282; 15 Ark. 624; 3 Kan. 450; 23 Tex. 210; see *contra*, 72 Ill. 37. See NEW TRIAL, *post*, § 1181.

1157. Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

Degree of crime.—The verdict should determine the degree of the crime—52 Cal. 454; 40 Id. 137; 53 Id. 627; 49 Id. 179; 15 Id. 38; 42 Ala. 509; 33 Ind. 167. The question of deliberation and premeditation is peculiarly within the province of the jury—43 Cal. 556. If the jury do not determine the degree, the court ought to order them to make the finding specific—15 Cal. 38; 19 Cal. 426. It is the duty of the jury to find the degree of guilt, and, though the indictment charge murder in the second degree, the jury may find a verdict in the first degree—34 Cal. 211; see 53 Id. 263. That the verdict must specify the degree—see 40 Cal. 129; 58 Me. 564; 103 Mass. 348; 19 Conn. 388; 12 Md. 514; 2 Houst. 585; Wright, 75; 3 Ohio St. 88; Id. 101; 8 Id. 98; 10 Ohio St. 459; 7 Clarke, 236; 17 Iowa, 329; 6 Mich. 273; 30 Wis. 437; 7 Kan. 143; 8 Id. 477; 9 Yerg. 279; 17 Ala. 618; 40 Id. 698; 54 Id. 520; 8 Mo. 495; 20 Id. 397; 31 Tex. 138; 10 Nev. 388; 17 Ga. 497; 36 Id. 222.

Where a statute requires in the verdict a designation of the degree, or the specific assessment of a punishment, a general verdict without such designation or assessment will be a nullity—5 Cal. 356; 49 Id. 174; Id. 241; 3 Gratt. 623; 5 Id. 697; 42 Ala. 509; 54 Ind. 441; 21 Mo. 629; 39 Id. 112; 3 Ohio St. 101; Id. 89; 115 Mass. 150; Morris, 259. A verdict imposing a greater punishment than that authorized by law, is void—40 Cal. 426; 2 Leigh, 737; Morris, 259; see 84 Ill. 216; 24 Mich. 410. Joint de-

defendants may be convicted of different degrees—9 Bush, 593; 31 N. Y. 229; 3 Cush. 384; 101 Mass. 14; 32 Mass. 405.

1158. Whenever the fact of a previous conviction of another offense is charged in an indictment or information, the jury, if they find a verdict of guilty of the offense with which he is charged, must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction. The verdict of the jury upon a charge of previous conviction may be: "We find the charge of previous conviction true," or, "We find the charge of previous conviction not true," as they find that the defendant has or has not suffered such conviction. [In effect April 9th, 1880.]

Previous conviction.—The jury may find upon the charge of a previous conviction—4 Cal. 376; 5 Id. 278; 49 Id. 395. The identity of the party on trial with the party in proceedings resulting in his prior conviction, is a question of fact for the jury—47 Md. 497; 14 Serg. & R. 69; 26 Ga. 614. See *ante*, §§ 666-667.

1159. The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense. [In effect April 9th, 1880.]

Lesser offense.—A jury may convict of a lesser offense included in a greater—5 Cal. 133; 29 Id. 579; 44 Id. 94; 5 Ala. 32; 2 La. An. 921; 42 N. H. 490; 5 Ohio, 242; as larceny on a charge of robbery—53 Cal. 58. Under an indictment for "an assault to commit murder," a verdict of "guilty of an assault to do bodily injury," is a conviction of a simple assault only—6 Cal. 562; 9 Id. 260; 30 Id. 218; 40 Id. 427; 44 Id. 94; Id. 581; 45 Id. 284; 49 Id. 229; 53 Id. 264. A general verdict is a conviction on every material allegation charged in the indictment; but if the jury intend a conviction of a lesser offense necessarily included in the charge, the offense intended must be specified—6 Cal. 543.

Where two offenses are joined in one count, the verdict may be not guilty of the greater and guilty of the less offense—17 Gratt. 570; Id. 576; 3 Cold. 77; 7 Kan. 106; 1 Hayw. 12; 3 Har. (Del.) 554; 12 Ohio St. 146; 6 R. I. 195; but there cannot ordinarily be a conviction of a minor offense, not included in the offense charged—83 Ill. 479; 7 Mass. 245; 12 Pick. 496; 22 Wend. 175; 3 Hill, 92; 1 N. Y. 379; 79 Pa. St. 503; 7 Serg. & R. 433; 2 Aiken, 181; 3 Vt. 344; 24 Id. 129; 30 N. J. L. 185; 5 Ohio, 1; Id. 242; Rice, 431; 3 McCord, 190; 34 Mich. 345; 8 Eng. 712; see 7 Port. 495; Rice, 431; 19 Pick. 479. A conviction of a lesser offense is an acquittal of the greater—4 Cal. 376; 5 Id. 278; 35 Id. 391. See *ante*, §§ 1155, 1157 and note.

1160. On an indictment or information against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered ac-

cordingly, and the case as to the others may be tried by another jury. [In effect April 9th, 1880.]

Verdict as to codefendant.—Convictions of codefendants are several—2 Ired. 402; 32 Miss. 406; 49 Vt. 437. A conviction of a joint offense can only be on evidence of joint guilt—see 14 Ohio. 386; 14 Gray. 57. One may be convicted and the other acquitted—6 Serg. & R. 577; 12 Mass. 313; 15 Abb. Pr. 147; 8 Blackf. 205; 34 Tex. 230; 10 Mo. 441; 29 Pa. St. 429; 14 B. Mon. 310. In cases of conspiracy and riot—see 5 McLean, 513; 1 Hill, 361; 10 La. An. 698; 2 Ashm. 31; 5 Pa. St. 73. On a joint indictment against two, proof that the offense was committed severally will not sustain a conviction of either or both—44 Ala. 414.

1161. When there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered; but when there is a verdict of acquittal, the court cannot require the jury to reconsider it. If the jury render a verdict which is neither general nor special, the court may direct them to reconsider it, and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially, and to leave the judgment to the court.

Amendment of verdict.—Where the verdict is not responsive to the offense charged, it will be sent back, and a verdict responsive will be directed—73 N. C. 44. Until the jury are discharged a verdict may be amended, but not after their discharge—31 Cal. 451; 11 Ohio, 473; see 10 Gray, 11; 2 Gratt. 508; 22 Ga. 211; 5 J. J. Mar. 675; and any informality, uncertainty, or impropriety may be amended before they separate—15 Cal. 426; 1 Nev. 543; 26 Ga. 593; 2 Gratt. 558; 2 Ashm. 91; 38 Miss. 295. See *ante*, § 1151, note.

1162. If the jury persist in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it must be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment is given against him on a special verdict.

1163. When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either

party, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation.

Polling jury.—Either party may require that the jury be polled—6 McLean, 182; 11 Ind. 569; 8 Ired. 330; 52 Ga. 478; 11 Ohio, 472; 77 N. C. 498; 1 Wend. 91; 6 Wis. 205; so, of the court on its own motion—31 Ark. 196. If any jurymen dissent, the verdict is a nullity, and the jury must again retire for deliberation—Breese, 109; 1 Ball. 3; 26 Ala. 167; 5 J. J. Mar. 676; but not if the dissent be withdrawn—6 Tex. Ct. App. 121; and see 6 McLean, 86; 11 Ind. 569; 23 Mich. 63.

1164. When the verdict given is such as the court may receive, the clerk must immediately record it in full upon the minutes, read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes, and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury must be discharged from the case.

Recording verdict.—Unless it appears that defendant may have been prejudiced in respect to a substantial right, the failure to record the verdict, read it to the jury, and ask if it is their verdict, is not fatal to the judgment—6 Pac. C. L. J. 968. A verdict does not become final until recorded in the minutes—6 Pac. C. L. J. 65; and judgment cannot be pronounced on it—*id.* If the jury is discharged before the verdict is entered on the minutes, the prisoner should be discharged—6 Pac. C. L. J. 65.

Acquittal, discharge, and detention.—Where the variance between the proof and indictment is of such a character that a conviction is impossible, the defendant has not been in jeopardy, and may be detained for further trial—17 Cal. 332; 28 *id.* 507; 9 *id.* 259; 29 *id.* 257; see 38 *id.* 476. See *ante*, Const. Prov. p. 17; and see JEOPARDY, *ante*, § 1016.

1165. If judgment of acquittal is given on a general verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given, except where the acquittal is because of a variance between the pleading and proof, which may be obviated by a new indictment or information, the court may order his detention, to the end that a new indictment or information may be preferred, in the same manner and with like effect as provided in section one thousand one hundred and seventeen. [In effect April 9th, 1890.]

1166. If a general verdict is rendered against the defendant, or a special verdict is given, he must be remanded, if in custody, or if on bail, he may be committed to the proper officer of the county to await the judgment of the court upon the verdict. When committed, his bail is exonerated, or if money is deposited instead of bail, it must be refunded to the defendant.

See BAIL, *post*, § 1288.

1167. If the jury render a verdict of acquittal on the ground of insanity, the court may order a jury to be summoned from the jury list of the county, to inquire whether the defendant continues to be insane. The court may cause the same witnesses to be summoned who testified on the trial, and other witnesses, and direct the district attorney to conduct the proceedings, and counsel may appear for the defendant. The court may direct the sheriff to take the defendant and retain him in custody until the question of continuing insanity is determined. If the jury find the defendant insane, he shall be committed by the sheriff to the State insane asylum. If the jury find the defendant sane, he shall be discharged. [Approved March 30th, in effect July 1st, 1874.]

CHAPTER V.

BILLS OF EXCEPTION.

- § 1170. In what cases.
- § 1171. When to be settled and signed.
- § 1172. Exceptions to decision of court by either party.
- § 1173. Exceptions to decision of the court by the defendant.
- § 1174. Exceptions, how settled.
- § 1175. What bill of exceptions is to contain.
- § 1176. Written charges need not be excepted to.

1170. On the trial of an indictment or information, exceptions may be taken by the defendant to a decision of the court—

1. In disallowing a challenge to the panel of the jury, or to an individual juror for implied bias.

2. In admitting or rejecting testimony on the trial of a challenge to a juror for actual bias.

3. In admitting or rejecting testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the law on the trial of the issue. [In effect April 9th, 1880.]

Exceptions.—To entitle errors complained of to review, they must be set out in a settled bill of exceptions properly signed—34 Cal. 303. An exception is a formal protest against the ruling of the court upon a question of law, and a bill of exceptions is a written statement, settled and signed by the judge, of what that ruling was, the facts in view of which it was made, and the protest of counsel—38 Cal. 141. The office of a bill of exceptions is to show that proper proceedings have been taken to perfect an appeal—45 Cal. 45.

Subd. 1. Exceptions may be taken for disallowing a challenge, in contradistinction to allowing a challenge for implied bias, for which no exception can be taken—53 Cal. 603; 51 id. 496; 49 id. 169; id. 680; 45 id. 144; 7 id. 140. But the decision of the court on a challenge for actual bias is not subject to review—49 Cal. 560; 53 id. 603; 49 id. 166. Sustaining a challenge for implied bias cannot be excepted to or reviewed—49 Cal. 679; 45 id. 142. See *ante*, §§ 1053-1054.

Subd. 2. A bill of exceptions may be maintained for refusing triers, or upon any question arising upon a challenge in a case where triers may be demanded—1 Denio, 281; 3 Ired. 532; 21 Wend. 509; or upon instructing triers upon questions of law—1 Denio, 281. See *ante*, §§ 1073, 1078, 1102, and notes.

Subd. 3. When a general objection is made to evidence, it must be understood to be taken to its competency—38 N. H. 324. Deliber-

ately permitting evidence to be given without objection, and then moving to strike it out on grounds which might readily have been availed of in the first instance, is not to be tolerated—43 Cal. 446. Where improper questions are permitted to be answered, it must show the answers given, or that they prejudiced the defendant—25 Mich. 499. An exception cannot be taken to an answer which is responsive to a question put without objection—39 Me. 359; see 29 Mich. 173. The error of excluding evidence is cured by its subsequent admission—4 Parker, 662. On a refusal of the court to admit evidence, it should state what he expected or believed the witness would testify—1 Met. (Ky.) 6. When a question objected to is not answered, no injury is done—45 Cal. 28. To the forms of questions asked, and to the range allowed counsel in their arguments, exceptions will not lie—1 Parker Cr. R. 147; *id.* 424; *id.* 474. See *ante*, §§ 1093, subd. 6; 1102, 1127, and notes.

1171. When a party desires to have the exceptions taken at the trial settled in a bill of exceptions, the draft of a bill must be prepared by him and presented, upon notice of at least two days to the district attorney, to the judge for settlement, within ten days after judgment has been rendered against him, unless further time is granted by the judge, or by a justice of the Supreme Court, or within that period the draft must be delivered to the clerk of the court for the judge. When received by the clerk, he must deliver it to the judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the judge and filed with the clerk of the court. [Approved February 18th, 1881.]

Settlement of bill of exceptions.—This section is directory—14 Cal. 510. A statement and bill of exceptions on this subject mean the same thing—14 Cal. 511. The judge here mentioned is the judge who should determine the motion for a new trial—55 Cal. 72. The district judge may refuse to consider or settle a bill of exceptions presented by defendant unless the notice required by section 1171 has been given to the district attorney—53 Cal. 423. He may refuse to settle a proposed bill which consists of reporters' notes, written out, containing questions and answers, and remarks of counsel, judge, and jurors—49 Cal. 564; 53 *id.* 423; it was never intended that the reporter's notes should constitute a bill of exceptions—49 Cal. 584; so, he may refuse, if it fails to state the evidence relative to the point presented in the narrative form, or its substance, or what it tended to prove—49 Cal. 581; 53 *id.* 423; or if it contains only a skeleton statement—53 Cal. 423; 16 Wis. 333. When an exception represents the matter differently from the statement made up by the judge, it will be disregarded, and the statement taken to be true—Busb. (N. C.) 436. Without having made a motion for a new trial, defendant may rely on any ground in section 1170, and in such case he must have a bill of exceptions settled as provided in this section—53 Cal. 184. Where it is intended to apply for settlement of the bill, after the statutory period of two days, notice must be given to the district attorney, and sufficient excuse must be shown for the delay in presenting or filing it—53 Cal. 423. The action of the court below, on motion to set aside the indictment, or on demurrer, can only be reviewed on an appeal from the judgment—39 Cal. 370. The stipulations of the attorney cannot be substituted for

the certificate of the judge to a bill of exceptions—37 Cal. 274; see 55 id. 72.

If the defendant should fail to prepare and tender a bill of exceptions within ten days, or such additional time as may be allowed, excuses therefor will be heard, and the bill may be signed—14 Cal. 519. A mandamus will issue, not to compel the signing of the bill filed absolutely, but to sign the same after it is duly settled—14 Cal. 512. Where it is not shown that there are reasonable grounds for the appeal taken, and it appears that it is intended merely for delay, and no application was made for time to prepare the statement immediately after the refusal of the court to act, mandamus must be denied—18 Cal. 433. A bill of exceptions not signed by the district judge will be disregarded on appeal—44 Cal. 327. The court will not inquire into the reason which induced the judge to sign the bill after the statutory period, but will presume they were sufficient—14 Cal. 511. See *post*, § 1176, note.

1172. Exceptions may be taken by either party to a decision of the court or judge upon a matter of law—

1. In granting or refusing a motion in arrest of judgment.

2. In granting or refusing a motion for a new trial.

3. In making, or refusing to make, an order after judgment, affecting the substantial rights of the parties.

Subd. 1. Exceptions at the trial and exceptions to the rulings on a motion in arrest are incompatible—32 Me. 581. Where no exception is taken to the denial of a motion in arrest of judgment, and the record does not set out the evidence on which the motion was made, the appellate court will presume that the motion was properly overruled—40 Ala. 72. See *post*, §§ 1185-1188, and notes.

Subd. 2. The judge here mentioned is the judge who should determine the motion for a new trial—55 Cal. 72. A motion for a new trial may be heard without any bill of exceptions—53 Cal. 183. Defendant may move for a new trial on any or all of the grounds in section 1181, and if the motion is denied, he may present a draft of his bill of exceptions, and have the same settled as provided in section 1174—53 Cal. 183. When the motion for the new trial was granted on the ground that the evidence was insufficient to justify the verdict, the question must be presented by bill of exceptions duly settled and certified by the judge—42 Cal. 536. See *post*, § 1179-1182, and notes, and see 55 Cal. 72.

Subd. 3. See *post*, § 1237, subd. 3 and note; and see 55 Cal. 72.

1173. Exceptions may be taken by the defendant to a decision of the court upon a matter of law—

1. In refusing to grant a motion for a change of the place of trial.

2. In refusing to postpone the trial on motion of the defendant.

Subd. 1. If there be cause of objection to an order for a change of place of trial, it must be stated in the court below—13 Ark. 26; see 1 Morris, 486. See *ante*, § 1034.

Subd. 2. An exception to the ruling on a motion refusing a continuance must be presented on appeal by a bill of exceptions, by embodying the affidavit in the bill, or in some mode clearly identifying it as having been read on the hearing of the motion—47 Cal. 108. See *ante*, § 1052; see 55 Cal. 72.

1174. Where a party desires to have the exceptions mentioned in the last two sections settled in a bill of exceptions, the draft of a bill must be prepared by him and presented, upon notice of at least two days to the adverse party, to the judge, for settlement, within ten days after the order or ruling complained of is made, unless further time is granted by the judge, or by a justice of the Supreme Court, or within that period the draft must be delivered to the clerk of the court for the judge. When received by the clerk, he must deliver it to the judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the judge, and filed with the clerk of the court. If the judge in any case refuses to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the Supreme Court to prove the same, the application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed, it has the same force and effect as if settled by the judge who tried the cause. If the judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may nevertheless settle such bill, or the party may, as provided in this section, apply to the Supreme Court to prove the same. [Approved March 30th, in effect July 1st, 1874.]

This section declared directory—34 Cal. 183. If the judge cannot be found, the bill of exceptions or statement may be delivered to the clerk of the court or judge, who must note the date of their receipt thereon—14 Cal. 510. The judge here mentioned is the judge who should determine the motion for a new trial. In the construction of an ambiguous statute, such a construction should not be given as would deprive a party of the right to be heard on a bill which has been settled and allowed by the judge who heard and ruled upon the motion—56 Cal. 72.

On motion for a new trial, it is not necessary to prepare a bill of exceptions or statement beforehand. It may be settled after the motion is heard and decided—6 Pac. C. L. J. 448; but there must be a bill settled by the judge after disposition of the motion—47 Cal. 631. The court may extend the time for the presentation of the draft of the bill of exceptions, to an order on motion for a new trial—53 Cal. 184. If the motion for new trial is denied, a bill of exceptions must afterwards be prepared, settled, and signed, showing that evidence was introduced tending to prove every material issue, and if it fails to show this, it will be presumed that the verdict was contrary to the evidence—51 Cal. 322. The record, on application for a mandate to compel the settlement of a bill of exceptions, must enable the Supreme Court to determine whether, if settled and signed, the bill would tend to manifest error on the trial—46 Cal. 54.

1175. A bill of exceptions must contain so much of the evidence only as is necessary to present the questions of law upon which the exceptions were taken; and the judge must upon the settlement of the bill, whether agreed to by the parties or not, strike out all other matters contained therein.

Bill, what to contain.—The bill of exceptions must contain so much of the evidence, only, as is necessary to present the questions of law on which the exceptions were taken—51 Cal. 322; and no more—53 id. 184. Where, after setting out the evidence, the bill stated "here the evidence closed," it was held a sufficient allegation that it contained all the testimony—10 Yerg. 549. It is not necessary in a bill of exceptions to specify the respects in which the evidence is alleged to be insufficient; it is sufficient to say the evidence is insufficient to sustain the verdict—51 Cal. 322. Where an exception is so obscure that the court cannot readily perceive the exact point, it will be disregarded—1 Parker Cr. R. 272.

A bill of exceptions showing error in the exclusion of evidence, must also show that the excluded testimony was material to the defendant, and that he was injured by its exclusion, or judgment will not be disturbed—47 Cal. 405. When a question might have been admissible under some circumstances, the record must show the facts previously established, or the court will not be able to pass on the propriety of the question or answer—45 Cal. 28; as where the declarations of a confederate are received in evidence, the bill of exceptions must show that he was not present when they were made, or it will not show error—45 Cal. 28. All omissions and uncertainties are to be construed against the party presenting the bill of exceptions—45 Cal. 28.

If it does not set out sufficiently the evidence adduced, the district attorney should be permitted to suggest the addition, but the appellate court cannot take his suggestion that further evidence was given—52 Cal. 211. It is the duty of the district attorney to state that every fact in issue was proved, except the fact or facts in respect to which the substance of the evidence is stated—51 Cal. 321. Any testimony given at the trial pertinent to the exception, and necessary to the correct presentation of the errors assigned, may be added by the court—46 Cal. 357. When the bill of exceptions does not recite the evidence, the court will presume that the evidence sustained the verdict—3 Humph. 389. So, where there was exception taken to the exhibition of burglarious tools, it will be presumed that necessary evidence was adduced upon which to base such introduction—29 Cal. 658. It is presumed that the bill contains all the evidence taken at the trial bearing on the point of the objection—52 Cal. 211.

1176. When written charges have been presented, given, or refused, or when the charges have been taken down by the reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges of the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions.

Charges given or refused.—This section refers to charges and instructions which either party may present, and ask to be given in accordance with § 1127 of this Code, and not to the charge of the court on its own motion—44 Cal. 598. An alleged error in the charge to the jury will not be noticed unless the party excepts, and by bill of exceptions places the charge on the record—20 Pick. 206; 14 Smedes & M. 120. A mere general exception to the charge, without specifying any grounds of error or asking for a particular charge, is not well taken—57 Barb. 46.

The refusal to give an instruction is not a ground unless the judge was requested to give it—38 Me. 554. Where a bill of exceptions is allowed, the facts embraced in it become part of the record, and a writ of error brings up the entire record, and error may be assigned on any part of it—5 Ala. 666. Where it does not disclose what the evidence was in relation to which the charge was given, it will be overruled if the instruction could have been correct in any supposable state of the evidence—5 R. I. 53.

Phonographic notes of evidence taken at the trial and transcribed into long-hand, even if verified by affidavit, do not constitute a part of the record on appeal for any purpose—44 Cal. 327; 43 Id. 177. They are no part of the bill of exceptions unless embodied therein, and referred to in the bill so as to identify them—53 Cal. 602. Before incorporating them in a bill of exceptions, all matter not necessary or proper to illustrate the points presented on appeal should be eliminated, and it then should be revised by the judge—42 Cal. 538. The report transcribed into long-hand from the reporter's notes is only *prima facie* a correct statement of evidence and proceedings, while a bill of exceptions imports absolute verity—42 Cal. 538; 28 Id. 218; 32 Id. 81; 34 Id. 309; 37 Id. 274; 40 Id. 286. See *ante*, § 1093, note.

PEN. CODE.—41.

CHAPTER VI.

NEW TRIALS.

- § 1179. New trial defined.
- § 1180. Its effect.
- § 1181. In what cases it may be granted.
- § 1182. Application for, when made.

1179. A new trial is a re-examination of the issue in the same court, before another jury, after a verdict has been given.

New trial.—A new trial is a re-examination after verdict, of facts and law not of record—3 Ga. 310; but an error which is apparent on the record, and which can be noticed in arrest of judgment, will not ordinarily be ground for a new trial—3 Conn. 289; as the omission of a letter from the prisoner's name on the bill found by the grand jury—1 Bay, 377. Where the name of a witness was indorsed on the indictment slightly variant from the real name, the misnomer was not sufficient to maintain a motion for a new trial—6 Pac. C. L. J. 399.

Objections to drawing and impanelling of the jury come too late on motion for a new trial. They are deemed waived if not taken in time—24 Cal. 230; 43 Id. 146. A general excitement against the prisoner at the time of the trial, in the community at large, is not a ground for a new trial—7 Watts & S. 422; but if such excitement pervade the jury-box, and works to the prejudice of the defendant, the verdict ought to be set aside—10 Cal. 195. It is no ground for a new trial that on a challenge for actual bias one of the triers is, on the panel of the jury, in attendance in the case—43 Cal. 147; Id. 167. The motion must be made *visa voce*, and if desired, the grounds and rulings of the court may be embodied in a bill of exceptions, and can be reviewed by the Supreme Court in no other way—41 Cal. 651.

1180. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment. [Approved March 30th, in effect July 1st, 1874.]

1181. When a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial, in the following cases only:

1. When the trial has been had in his absence, if the indictment is for a felony.

2. When the jury has received any evidence out of court other than that resulting from a view of the premises.

3. When the jury has separated without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented.

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors.

5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.

6. When the verdict is contrary to law or evidence.

7. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly-discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable.

Grounds for new trial.—This section clearly excludes all other grounds—43 Cal. 146, overruling 9 Cal. 298. Instead of appealing from the judgment, defendant may move for a new trial on any or all of the grounds mentioned in this section, and if the motion be denied, may present the draft of a bill of exceptions, and have the same settled as provided in § 1174—53 Cal. 184. See *ante*, § 1172.

Subd. 1. It is not sufficient simply to object that defendant was not present at times when acts can only be done in his presence; he must prove his absence—4 Cal. 218; 37 id. 274.

Subd. 2. Where a witness conversed with one or more of the jurors on the facts of the case, when out of court to view the premises, it was error—43 Cal. 167. See *ante*, § 1102.

Subd. 3. A separation of the jury in a capital case is *prima facie* ground for a new trial, subject to be rebutted by proof that no improper influence reached the jury—22 Cal. 348; 12 Ark. 732; 1 Conn. 401; 19 Gratt. 485; 20 Ga. 752; 8 Humph. 597; 11 Ired. 514; 21 Ill. 373; 30 id. 256; 24 Ind. 151; 1 Kan. 340; 1 Cowen, 26; 39 Miss. 721; 3 Minn. 444; 7 N. H.

291; 14 N. Y. 562; 12 Pick. 496; 7 R. I. 337; 31 N. J. L. 249; 30 Wis. 132; 37 Id. 396. To separate, so that a juror may be improperly influenced, unless under permission of the court, is error—5 Cal. 275; and consent of defendant's counsel will not authorize it—*id.* The defendant need not show that the jury were subjected to improper influences during their separation; it is sufficient if they might have been—5 Cal. 275; 17 Id. 78; 19 Id. 445; see 8 Humph. 597; 7 N. H. 287; 4 Humph. 27; 9 Id. 646; 3 Parker Cr. R. 25; 12 Ark. 782; 10 Yerg. 241; 3 Minn. 444; 16 Id. 178; Dud. (Ga.) 28; 1 Kan. 340.

It is in the discretion of the court to allow the jury to view the premises in the absence of the defendant—19 Cal. 445; but a direct violation of the rule not to separate, is an irregularity which entitles defendant to a new trial, unless it is shown that he was not prejudiced—21 Cal. 337.

The presumption of prejudice to defendant from the unpremeditated separation of the jury, may be rebutted—22 Cal. 348. It ought to be shown that there has been a material or substantial violation of defendant's rights, or an opportunity for such violation—20 Cal. 432. It is not ground, under this subdivision, for setting aside a verdict, that jurors lifted up a fainting witness and retired with her, the deputy sheriff being present—17 Cal. 78. The retirement of the jury for a few moments for a necessary purpose, by permission of the sheriff, out of his sight, with proof that there was no communication with each other or any one else, is not a sufficient ground for a new trial—41 Cal. 238.

Where the jury were left a short time unattended, no intrusion by other persons being shown, is not a ground for a new trial—46 Cal. 337; 25 La. An. 573. Where the jury, after they had retired for deliberation, were conducted to the dining-room of a hotel, where they remained together three quarters of an hour, one of the doors being open and accessible to strangers, and the officer being absent a few minutes at a time, it was held insufficient to constitute misconduct on the part of the jury or the officer, for which a new trial should be granted—46 Cal. 357. The fact that the officer, after the jury had retired, was absent some minutes, and that some person outside the jury-room spoke to the juror, and that some of the jurors spoke to persons outside, it not appearing what was said or that it had any reference to the trial; and the fact that after the jury had agreed on their verdict they were allowed to remain in the court-room in the presence of others while the officer went out, and waited some minutes for the judge, and it not appearing that there was any communication with the jury, are not sufficient grounds for a new trial—20 Cal. 435.

Improper conduct.—The presumption is that the jurors performed their duty in accordance with their oaths, and there must be direct and positive testimony to overthrow this presumption—24 Cal. 31. So, a new trial will not be granted because of vague opinions against the prisoner existing in the minds of several of the jurors—27 Cal. 507; 1 Dutch. 566; 18 Ga. 383; 17 N. H. 171; 2 Va. Cas. 474; 7 Watts & S. 422.

Where one of the jurors stated that if it was true the prisoner had committed the act charged, he ought to be hung, the objection, to be available, must be made before verdict—43 Cal. 137; 46 Id. 114; overruling 9 Cal. 298. The remark of a juror during a recess of the trial that there is no use in taking up time in trying to humbug the jury, and the lawyer who made the shortest speech would win the case, is not such conduct as will vitiate the verdict—6 Cal. 228; but see 4 Humph. 289. The fact that after the verdict of guilty has been rendered, the accused ascertains for the first time that before the grand jury was impaneled a juror had formed and expressed an opinion as to his guilt, is not a ground for a new trial—46 Cal. 120; 43 Id. 145.

Subd. 4. A juror cannot, by affidavit, impeach his own verdict—15 Cal. 70; 1 id. 403; 5 id. 42; id. 45; 25 id. 475; 15 id. 75; 1 id. 403; 48 id. 85; 5 Ark. 445; 4 Blinn. 150; 8 Blackf. 101; 5 Conn. 348; 22 Gratt. 924; 5 Ired. 401; 3 Ind. 167; 54 id. 339; 4 Johns. 487; 9 Kan. 119; 15 La. An. 557; 65 Me. 111; 4 Mass. 391; 39 Mo. 320; 65 id. 149; 66 id. 148; 23 N. H. 301; id. 321; 74 N. C. 46; 78 id. 560; 1 Parker Cr. B. 256; id. 262; id. 676; 2 id. 777; 1 Wend. 297; 9 Yerg. 408; 3 Tex. 31; 9 Ga. 121; but affidavits of jurors are admissible to explain, correct, or enforce their verdict—23 Cal. 40.

The affidavit of a juror cannot be admitted to purge his conduct from the imputation of impropriety—5 Cal. 275; 29 id. 257; 15 Ga. 223; 37 Mo. 240; 26 Miss. 78; 4 Vt. 363; but see 3 Me. 204; 6 Gratt. 219; nor is it admissible to prove that he had previously formed and expressed an opinion before the trial so as to justify a new trial—1 Cal. 403; see also 43 id. 146; overruling 9 Cal. 298. It will not be permitted to be shown that one or more of the jurors agreed to the verdict under the impression that the court, and not the law, fixed the punishment—17 Cal. 76; nor that the verdict was arrived at by lot or chance—25 id. 460; 29 id. 257; see 20 Iowa, 19; 9 Kan. 718. The fact that after a verdict of guilty has been rendered, the accused ascertains for the first time that before the jury was impaneled a juror had formed and expressed an opinion as to his guilt, is not ground for a new trial—46 Cal. 120; 43 id. 145.

Subd. 5. Mistake in the admission or rejection of evidence is a ground for new trial, if objection was duly taken at the trial—49 Cal. 32; 33 Ga. 4; 39 id. 708; 3 Helsk. 76. Immaterial testimony, which does not in any manner prejudice defendant, is no ground of error—6 Pac. C. L. J. 208. A verdict will not be set aside because improper evidence was admitted, if no objection to its admission was made at the trial—48 Cal. 277; 33 Ga. 4; 39 id. 708; 3 Helsk. 376. Error in the disallowance of a challenge to a juror is a ground for new trial—40 Cal. 288.

A new trial will not be granted on account of the exclusion of particular evidence, when the objection to such evidence is withdrawn after its exclusion, and the defendant had an opportunity to offer it—28 Cal. 468; 63 N. C. 33; 19 N. Y. 549. Where a witness was withdrawn before testifying, the fact that her appearance on the stand was calculated to excite the sympathies of the jury, is no ground for a new trial—21 Cal. 261.

After acquittal of defendant, there can in general be no new trial, though the result be produced by error of law or misconception of fact—38 Cal. 467; 40 id. 613; 2 Blackf. 5; 2 Brev. 126; 6 Grant Cas. 66; 13 Mass. 245; 19 Mo. 683; 71 N. C. 263; 3 Smedes & M. 751; 2 Sum. 20; 10 R. I. 494; 1 Spenc. 115; 9 Yerg. 333. Where the testimony is relevant, but its logical and legal effect is misdirected to the prejudice of the defendant, mainly due to the course adopted by the prosecution, a new trial will be granted—36 Cal. 255. To entitle a defendant to a new trial, the erroneous proceeding or instruction must have caused injury to him—11 Conn. 415; 14 Ga. 55; 23 Vt. 551; 7 Wend. 417; 37 Conn. 355.

Where instructions are contradictory on a material point, there should be a new trial—44 Cal. 69; 30 id. 316; 39 id. 577; 43 id. 552; 11 id. 161; 1 id. 354. See *ante*, § 1127, note. It is not such irregularity as to authorize a new trial, for a judge, other than the one who tried the case by consent, to charge the jury and receive the verdict—28 Cal. 471; nor is it such error for the judge of the district to resume his seat and pass on the motion without objection—id. An erroneous order may be set aside by the court of its own motion—44 Cal. 33.

Subd. 6. Where the motion is based on the ground of insufficiency of evidence to sustain the verdict, all the evidence on the trial must be contained in the record—43 Cal. 177; id. 55; see 2 id. 484. If the verdict be set aside on the ground that it is contrary to the evidence, and an appeal be taken from the order, the record must show what

the evidence was, or the question as to the sufficiency or insufficiency of the evidence cannot be considered—43 Cal. 66. The want of evidence must not only be apparent, but there must be such strong evidence against the verdict as to produce the inference that it was rendered under the influence of passion or prejudice, or other bias—21 Cal. 400. A verdict will not be disturbed unless there is such want of evidence or preponderance against it as to warrant it—10 Cal. 301.

The defendant may move for a new trial on the ground of preponderance of evidence in his favor upon some issue material to the prosecution to establish—47 Cal. 100. When the motion is made on the ground that the verdict is against the evidence, it is heard as though brought on for hearing immediately after the rendition of the verdict, and neither statements nor reporter's notes are required to be filed in its support—51 Cal. 322.

If it is claimed that the evidence is not sufficient to support the verdict, where defendant appeals and material evidence introduced by the plaintiff is left out of the record, the appellate court will not grant a new trial—49 Cal. 428. The verdict will not be disturbed on the ground that the evidence does not justify it, if the evidence is conflicting—45 Cal. 286. If there be conflicting evidence on both sides, and the question be one of doubt, the verdict will generally be permitted to stand—50 Cal. 304; 13 Ark. 694; 15 id. 634; 2 Ball. 291; 1 Blackf. 395; 33 Ga. 24; 1d. 98; 55 id. 47; 1d. 556; 4 Ind. 540; 45 id. 157; 3 Iowa, 339; 15 id. 72; 3 Humph. 289; 10 id. 144; 3 Kan. 450; 37 Mo. 343; 49 id. 282; 4 Neb. 68; 7 Watts & S. 415; 4 Yerg. 152. See *ante*, § 1156.

Subd. 7. A new trial will not be granted on the ground of newly-discovered evidence, which is in conflict with the evidence given on the trial—45 Cal. 148. Newly-discovered evidence, cumulative in its character, is not sufficient ground for a new trial—47 Cal. 138; 45 Barb. 201; 3 Ga. 310; 6 id. 276; 2 Ashm. 41; 1d. 69; 7 Watts & S. 415; or, if it would only impeach the evidence of a witness on a former trial, it is not sufficient grounds—2 Ind. 608; 13 Ga. 513; 34 id. 110; 39 id. 718; 5 Mass. 261; 14 Mo. 348; Charit. R. M. 505; 7 Tex. 69. The evidence offered must be material, and not merely cumulative and corroborative, or collateral—47 Cal. 134; 2 Ashm. 69; 15 Ark. 395; 17 id. 404; 45 Barb. 201; 31 Ga. 411; 39 id. 718; 54 id. 303; 47 Ill. 376; 20 Mo. 435; 26 id. 306; 65 id. 574; 67 id. 59; 8 Neb. 406; 7 Watts & S. 415; Walk. Ch. 7; 36 Tex. 642.

On the motion for a new trial the evidence in question must be specified, and the name of the witness be stated—41 Cal. 645; 28 Ark. 121; 37 Ind. 533; 14 Kan. 135. When newly-discovered evidence is the ground of the motion, the circumstances should be stated to show its materiality and admissibility—43 Cal. 168. A motion on this ground should not be granted without a satisfactory showing of diligence—53 Cal. 741; 6 Pac. C. L. J. 938.

1182. The application for a new trial must be made before judgment.

CHAPTER VII.

ARREST OF JUDGMENT.

- § 1185. Motion in arrest of judgment.
- § 1186. Court may arrest judgment without motion.
- § 1187. Effect of arresting judgment.
- § 1188. Defendant, when to be held or discharged.

1185. A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant, on a plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment or information mentioned in section one thousand and four, unless the objection has been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment. [In effect April 9th, 1880.]

Arrest of judgment.—A motion in arrest of judgment is a proceeding on behalf of a prisoner, after verdict, and before sentence and judgment, for error appearing on the face of the record—43 N. Y. 28. An application for an order is made *visa voce*. Making out and filing a written application is not sufficient. The attention of the court must be called to it, and the court be moved to grant it—41 Cal. 650. The motion must be founded on some of the defects mentioned in § 1004—48 Cal. 559; id. 253. It may be made on any of the grounds of demurrer, and the action thereon had may be reviewed on appeal—30 Cal. 370. See *ante*, § 960.

When the statute enumerates the grounds upon which judgment may be arrested, all others are excluded—43 Cal. 137; 24 id. 230. It can only be entertained for matter apparent upon an inspection of the record—9 Ga. 68; 38 Me. 592; 49 id. 588; and formal defects, not affecting material rights, do not authorize an arrest of judgment—37 Cal. 28; as, the verdict cures informalities in the indictment—49 id. 388; 20 Pa. St. 441; 20 Pick. 356; 3 Hill, (S. C.) 1; 6 Tex. Ct. App. 435.

A motion in arrest of judgment, based on defects in the indictment, must specifically set out the defects, to entitle the point to consideration in the Supreme Court—37 Cal. 277. See *ante*, § 1004. If the indictment contains one good count, the overruling of the demurrer is not error—6 Pac. C. L. J. 610. If the defendant fails to demur, he cannot move an arrest of judgment on the ground that the indictment does not conform to the provisions of this Code—49 Cal. 390. If the indictment charges any offense, as an assault, the court cannot arrest the judgment, on the ground that the facts stated in the indictment do not constitute a public offense, even if judgment is pronounced for a higher offense—49 Cal. 390. If the objection, that more than one of

fense is charged, is not taken by demurrer, it cannot be considered on arrest of judgment—27 Cal. 403.

An indictment which charges that defendant was in the county where it was found, and then and there feloniously burned a building, sufficiently shows that the offense was committed at a place within the jurisdiction—44 Cal. 495. A variance in the name of the insurance company, given in the indictment for arson, is not a ground for arrest of judgment—29 Cal. 257; 32 id. 165. An order granting a motion in arrest of judgment, on account of alleged defects in the indictment, after judgment, is not appealable—44 Cal. 384; see 42 id. 625. It is not limited to the indictment, but may be made upon the whole record—6 Parker Cr. E. 657.

The judgment cannot be sustained where defendant had not been arraigned—44 Cal. 542. Where there was no plea and no issue to try, there can be no judgment—44 Cal. 542. If the offense is not committed in the county where the indictment is found, the court should, on its own motion, arrest the judgment—27 Cal. 340; but where the acts are committed partly in one county and partly in another, and are one transaction, it is otherwise—39 Cal. 405. If a committing magistrate promises a person that, if he will become a witness for the people against others, he shall be acquitted, and induced by such persuasion he testifies and implicates himself and is afterward indicted, these facts do not furnish ground for arrest of judgment—48 Cal. 251.

1186. The court may also, on its own view of any of these defects, arrest the judgment without motion.

Court may arrest judgment.—A court may, of its own motion, or upon application of a party interested, modify or set aside an erroneous order; so the court may, upon its own view of fatal defects in the indictment, arrest the judgment without motion—44 Cal. 34. Where it is manifest that the offense of the accessory was committed in another county than that where the indictment was found, the court should arrest the judgment on its own motion—27 Cal. 341.

1187. The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the indictment was found or information filed. [In effect April 9th, 1880.]

Effect of arrest of judgment.—The effect of the order to arrest judgment is to place the defendant, as nearly as other and controlling rules of law will permit, in the same situation as he was before indictment—44 Cal. 34. And upon its entry he must be discharged, unless he is detained by virtue of other legal process or orders—44 Cal. 34.

1188. If, from the evidence on the trial, there is reason to believe the defendant guilty, and a new indictment or information can be framed upon which he may be convicted, the court may order him to be recommitted to the officer of the proper county, or admitted to bail anew, to answer the new indictment or information. If the evidence shows him guilty of another offense, he must be committed or held thereon, and in neither case shall the

verdict be a bar to another prosecution. But if no evidence appears sufficient to charge him with any offense, he must, if in custody, be discharged; or if admitted to bail, his bail is exonerated; or if money has been deposited instead of bail, it must be refunded to the defendant; and the arrest of judgment shall operate as an acquittal of the charge upon which the indictment or information was founded. [In effect April 9th, 1880.]

Discharge of defendant. The defendant cannot be discharged from the indictment without trial, except in the cases provided by statute—48 Cal. 253. If from the evidence there is reason to believe the defendant guilty, and a new indictment can be framed, the court may order him to be recommitted to the officers of the proper county, or admitted to bail to answer the new indictment—44 Cal. 34. Where a verdict was received and recorded by the clerk, and the court then directed the jury to retire in custody of the sheriff, and amend their verdict to conform to the phraseology of the law, it is mere error to be corrected on appeal, and does not render the judgment void so as to warrant a discharge on habeas corpus—44 Cal. 35; 6 Id. 562; 30 Id. 214. See *post*, § 1485.

TITLE VIII.

Of Judgment and Execution.

- CHAP. I. THE JUDGMENT, §§ 1191-1207.**
II. THE EXECUTION, §§ 1213-30.

CHAPTER I.

THE JUDGMENT.

- § 1191. Appointing time for judgment.
- § 1192. Upon plea of guilty, court must determine degree.
- § 1193. Presence of defendant.
- § 1194. Defendant in custody, how brought for judgment.
- § 1195. How brought before the court when on bail.
- § 1196. Bench-warrant to issue.
- § 1197. Form of bench-warrant.
- § 1198. Warrant, how served.
- § 1199. Arrest of defendant.
- § 1200. Arraignment of defendant for judgment.
- § 1201. What cause may be shown against the judgment.
- § 1202. If no cause shown, judgment to be pronounced.
- § 1203. Circumstances in aggravation or mitigation of punishment.
- § 1204. Proof of former conviction, etc., in mitigation, how made.
- § 1205. Duration of imprisonment on judgment to pay a fine.
- § 1206. Judgment to pay a fine constitutes a lien.
- § 1207. Entry of judgment and judgment roll.

1191. After a plea or verdict of guilty, or after a verdict against the defendant on the plea of a former conviction or acquittal, if the judgment be not arrested or a new trial granted, the court must appoint a time for pronouncing judgment, which, in cases of felony, must be at least two days after the verdict, if the court intend to remain in session so long; but if not, then at as remote a time as can reasonably be allowed. [Approved March 30th, in effect July 1st, 1874.]

Appointing time for judgment.—A judgment cannot be pronounced before the verdict is complete and is recorded in the minutes—6 Pac. C.L. J. 65. It is not error for the court to name the day for passing sentence when the defendant is not in court—9 Cal. 115. The defendant may waive the statutory time, and consent that judgment be pronounced immediately—46 Cal. 96; as a party may waive a right created by statute—id.; but in no case can judgment be rendered within six hours after verdict—id. It is doubtful whether the limitation of time fixed by the Code applies in case of a judgment on a plea of guilty—46 Cal. 96. A judge who did not preside at the trial, may, if legally presiding at the time fixed, pronounce judgment—28 Cal. 465.

The time at which the sentence shall be carried into effect forms no part of the judgment—2 Ired. 204. A mandate will not issue to compel a court to render judgment of acquittal in a criminal case—45 Cal. 249. See *ante*, § 1155, note.

1192. Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree.

Court to determine degree.—Upon the plea of guilty, the court is to determine the degree—52 Cal. 454; 49 *id.* 178; 20 *id.* 166; and this must be done before passing sentence—52 Cal. 454. On a plea of guilty, it is not necessary that any time should elapse between the determination by the court of the degree of the crime and the pronouncing of the judgment—20 Cal. 166; nor that the determination should be expressed in any particular form. Any decision or judgment which shows the conclusions derived from the examination is a compliance with the statute—20 Cal. 166.

If the jury convict of murder in the first degree, and cannot agree upon the degree of punishment, or do not declare it in their verdict, it is the duty of the court to pronounce judgment of death—49 Cal. 174. The presumption is, that the court, by testimony, ascertains the degree; hence, a sentence of imprisonment where defendant pleaded guilty of murder, was a nullity—32 Cal. 48. The proceeding under this section is not a trial, and the defendant has not the right to have the question decided by a jury—20 Cal. 166. If a demurrer to an indictment is overruled, and the defendant refuses to plead, the court may pronounce judgment against him as on a plea of guilty—28 Cal. 271; see 29 *id.* 563. Where there has been a general verdict of guilty on the whole indictment containing several counts for offenses of different grades, a sentence on the count for the highest grade is proper—75 N. Y. 487.

1193. For the purpose of judgment, if the conviction is for felony, the defendant must be personally present; if for a misdemeanor, judgment may be pronounced in his absence.

Presence of defendant—42 Cal. 168. Upon a conviction for felony, it is necessary that the defendant should be present when judgment is pronounced—42 Cal. 168; 9 *id.* 115; but the court may, in the absence of the defendant, fix the day for pronouncing judgment—9 Cal. 115. Absence of defendant is not permitted at the sentence—39 Ala. 691; 49 Miss. 716; 52 *id.* 391; 69 Pa. St. 286; 1 Root, 90. Where the offense is a misdemeanor, or where the punishment is simply a fine, the absence of defendant at his sentence, being under recognizance, may be allowed—1 Curt. 435; 7 Cowen, 525; 4 Iowa, 354; 9 Dana, 304; 19 Ark. 214; 12 Wend. 344; 16 Pa. St. 129; 36 Miss. 531; 9 Ill. 111.

1194. When the defendant is in custody, the court may direct the officer in whose custody he is to bring him before it for judgment, and the officer must do so.

1195. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary,

the court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may direct the clerk to issue a bench-warrant for his arrest.

1196. The clerk, on the application of the district attorney, may, at any time after the order, whether the court be sitting or not, issue a bench-warrant into one or more counties.

1197. The bench-warrant must be substantially in the following form: "County of ——. The People of the State of California, to any sheriff, constable, marshal, or policeman in this State: A. B., having been on the — day of — A. D. eighteen hundred and —, duly convicted in the Superior Court of the County of —, of the crime of — (designating it generally), you are therefore commanded forthwith to arrest the above named A. B., and bring him before that court for judgment. Given under my hand with the seal of said court affixed, this — day of —, A. D. eighteen hundred and —. By order of the Court. [SEAL.] E. F., Clerk."

[In effect April 12th, 1880.]

1198. The bench-warrant may be served in any county in the same manner as a warrant of arrest, except that when served in another county it need not be indorsed by the magistrate of that county.

1199. Whether the bench-warrant is served in the county in which it was issued or in another county, the officer must arrest the defendant and bring him before the court, or commit him to the officer mentioned in the warrant, according to the command thereof.

1200. When the defendant appears for judgment, he must be informed by the court, or by the clerk, under its direction, of the nature of the charge against him, and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him. [In effect April 9th, 1880.]

1201. He may show, for cause against the judgment:

1. That he is insane; and if, in the opinion of the court, there is reasonable ground for believing him to be insane, the question of insanity must be tried as provided in chapter six, title ten, part two of this Code. If, upon the trial of that question, the jury find that he is sane, judgment must be pronounced, but if they find him insane, he must be committed to the State lunatic asylum until he becomes sane; and when notice is given of that fact, as provided in section one thousand three hundred and seventy-two, he must be brought before the court for judgment.

2. That he has good cause to offer, either in arrest of judgment or for a new trial; in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon a motion in arrest of judgment or for a new trial.

Cause shown against judgment.—If the prisoner objects that he was absent at the time of trial, or rendition of verdict, or passing of sentence, he must prove it—4 Cal. 218.

1202. If no sufficient cause is alleged or appears to the court why judgment should not be pronounced, it must thereupon be rendered.

Form and sufficiency of judgment.—Judgments of inferior criminal courts are not required to be, in form, different from those of like courts of general jurisdiction—22 Cal. 135. The judgment need not contain a recital of the particular offense, but only of the general offense within which it is included—43 Cal. 457. The court has jurisdiction to pronounce for some offense for which he might have been convicted under the indictment—31 Cal. 619. It is not irregular in most jurisdictions, when the offenses are distinct, and there are separate verdicts, to sentence specifically on each count—7 Serg. & E. 476; Bright, N. P. 331; 69 Pa. St. 482; 5 id. 60; 52 id. 423; 78 id. 294; 81 Ill. 116; 22 Wis. 441; 14 Rich. 163; 3 Mo. 9.

When the jury fail to agree on a second count, but convict on the first, defendant may be sentenced on the first—50 Wis. 216; 1d. 416. Where several persons are jointly indicted and convicted, they should be sentenced severally—16 Ark. 37; 14 B. Mon. 386; 3 Wis. 785; 10 Mo. 440; 21 id. 504; 61 id. 302. The court cannot sentence for a term longer than that provided by the statute. If it does, the judgment will be reversed—48 Cal. 549. It is enough to specify that the imprisonment shall continue "for the term of three years" from the date of incarceration or imprisonment—29 Cal. 257; 21 Kan. 638; 10 Nev. 107.

A sentence that defendant "be imprisoned four years from the time of his delivery to the warden," etc.—29 Cal. 257; or, "that defendant be imprisoned in the State prison for the term of three years

from the date of his incarceration"—28 *Id.* 266; or, that defendant be imprisoned for a specified term, "to commence at the expiration of previous sentences," is valid—22 *Id.* 135. A judgment of conviction should be certain and final, and subject to no future decision or contingency—1 *Blackf.* 37. Errors or omissions in the entry of judgment can be examined only on appeal, and not on habeas corpus—43 *Cal.* 457. An error which will render a judgment voidable only, is the want of adherence to some prescribed mode of procedure, but an error which renders a judgment void is such an illegality as is contrary to the principles of law—31 *Cal.* 619. A judgment upon conviction of a misdemeanor, which adjudges imprisonment in the State prison, is void—40 *Cal.* 426.

1203. After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.

Discretion of court.—When the verdict is guilty, the court may, of its own motion, take notice of a prior conviction of the defendant on its own records, or hear proof of his character and antecedents, either to aggravate or extenuate his guilt—52 *Cal.* 453; 20 *Ala.* 36; 2 *Johns.* 73; 9 *Pick.* 206. Statutes providing for an increased punishment for a second offense are not in conflict with constitutional provisions as to jeopardy—47 *Cal.* 113; 9 *Phila.* 583. As a general rule, the sentence when imposed by a court of record is within the power of the court, and may be amended at any time during the term—4 *Cal.* 238; 8 *Mich.* 70; 32 *Ohio St.* 113; 2 *Allen.* 144; 1 *Pitts.* 169; see 3 *Wall.* 320; 5 *Barb.* 265; 28 *Ga.* 235. The judgment may be corrected at any time during the term—1 *Parker Cr. R.* 374; 1 *Whart.* 279; 5 *Gratt.* 682.

Where the court, after conviction of murder, sentenced the prisoner to be executed, afterward caused him to be again brought into court, and amended the sentence by shortening the time, it was held proper—4 *Cal.* 238. When a term of imprisonment is still unexpired, the proper course is to appoint the second imprisonment to begin at the expiration of the first, to be specifically referred to in the sentence—22 *Cal.* 135; 51 *Me.* 363; 11 *Met.* 581; 18 *Ohio St.* 46; 5 *Day.* 175; 4 *Rawle.* 259; 13 *Pa. St.* 634; but see 11 *Ind.* 389. After sentence, but before judgment is signed, it may be amended by shortening the time—4 *Cal.* 238. See *ante*, § 166, note.

1204. The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in

aggravation or mitigation of the punishment, except as provided in this and the preceding section.

See *ante*, § 166, note.

1205. A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine. [Approved March 7th, 1874.]

Imprisonment to satisfy fine.—The defendant may be imprisoned to enforce the payment of a fine—7 Cal. 209. The prisoner is entitled to a credit of two dollars per day while in prison—28 Cal. 414. A judgment of a justice of the peace in case of a misdemeanor that defendant be fined five hundred dollars, and in default of payment that he be imprisoned not exceeding three hundred days, is in substantial compliance with this section—54 Cal. 205; 28 id. 414.

1206. A judgment that the defendant pay a fine constitutes a lien, in like manner as a judgment for money rendered in a civil action.

See *post*, § 1570.

1207. When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, (if one) and must, within five days, annex together and file the following papers, which will constitute a record of the action:

1. The indictment or information, and a copy of the minutes of the plea or demurrer.
2. A copy of the minutes of the trial.
3. The charges given or refused, and the indorsements thereon. And,
4. A copy of the judgment.

[In effect April 9th, 1880.]

Subd. 2. A copy of the minutes of the trial constitutes a part of the judgment roll—52 Cal. 480. The entry made in the minutes is part of the judgment roll, and errors and omissions in the record can be examined only on appeal—53 Cal. 457.

Subd. 3. The charge given to the jury on its own motion is no part of the judgment roll—44 Cal. 598. This subdivision refers to the written charges or instructions which either party may present and ask to be given in accordance with §§ 400 and 401—44 Cal. 598.

Subd. 4. The judgment need not contain a recital of the particular offense, but only the general offense in which the particular offense is included—43 Cal. 457; 28 id. 247.

CHAPTER II.

THE EXECUTION.

- § 1213. Execution of a judgment other than of death.
- § 1214. If for fine alone, execution to issue as in civil cases.
- § 1215. Judgment of fine and imprisonment, how executed.
- § 1216. Judgment of imprisonment. Duty of sheriff.
- § 1217. Execution upon judgment of death.
- § 1218. Transmission of conviction and testimony to governor.
- § 1219. Governor may require opinion of Supreme Court thereon.
- § 1220. Judgment of death, when suspended.
- § 1221. Insanity of defendant, how determined.
- § 1222. Duty of district attorney upon inquisition.
- § 1223. Inquisition, how certified and filed.
- § 1224. Proceedings upon finding of jury.
- § 1225. Proceedings when female is supposed to be pregnant.
- § 1226. Proceedings upon the finding of the jury.
- § 1227. Judgment of death remaining in force, not executed.
- § 1228. Punishment of death, how inflicted.
- § 1229. Execution, where to take place and who to be present.
- § 1230. Return upon death-warrant.

1213. When a judgment, other than of death, has been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution.

Execution of judgment.—A commitment which does not contain a copy of the judgment, but merely recites the history of the action, is not sufficient authority for the detention of the prisoner—31 Cal. 497; id. 619. No other authority for the detention of a prisoner is required than a certified copy of the judgment rendered against him—32 Cal. 48; 31 id. 619; 28 id. 247.

1214. If the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil action.
See *ante*, § 1206.

1215. If the judgment is for imprisonment, or a fine, and imprisonment until it be paid, the defendant must

forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with.

See *ante*, § 1205.

1216. If the judgment is for imprisonment in the State prison, the sheriff of the county must, upon receipt of a certified copy thereof, take and deliver the defendant to the warden of the State prison. He must also deliver to the warden the certified copy of the judgment, and take from the warden a receipt for the defendant.

See *ante*, § 1213.

1217. When judgment of death is rendered, a warrant, signed by the judge, and attested by the clerk under the seal of the court, must be drawn and delivered to the sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of judgment.

Execution of death sentence.—The day for execution of the sentence should not be designated in the judgment, but in the warrant of execution—45 Cal. 141; 38 Id. 699; 45 Id. 141; 54 Id. 92. If the judgment of death be not executed on the day appointed, the court rendering the judgment may appoint another day for carrying it into execution—38 Cal. 701. It is not the function of the court to fix the time and place of execution in the original sentence—45 Cal. 137; 55 Ala. 81.

1218. The judge of the court of which a conviction requiring judgment of death is had, must, immediately after the conviction, transmit to the governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial.

1219. The governor may thereupon require the opinion of the justices of the Supreme Court and of the attorney-general, or any of them, upon the statement so furnished.

1220. No judge, court, or officer, other than the governor, can suspend the execution of a judgment of death, except the sheriff, as provided in the six succeeding sections, unless an appeal is taken.

1221. If, after judgment of death, there is good reason to suppose that the defendant has become insane, the

sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon from the list of jurors selected by the supervisors for the year a jury of twelve persons to inquire into the supposed insanity, and must give immediate notice thereof to the district attorney of the county.

1222. The district attorney must attend the inquisition, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court.

1223. A certificate of the inquisition must be signed by the jurors and the sheriff, and filed with the clerk of the court in which the conviction was had.

1224. If it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the governor or from the judge of the court by which the judgment was rendered directing the execution of the judgment. If the inquisition finds that the defendant is insane, the sheriff must immediately transmit it to the governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment.

1225. If there is good reason to suppose that a female against whom a judgment of death is rendered is pregnant, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon a jury of three physicians to inquire into the supposed pregnancy. Immediate notice thereof must be given to the district attorney of the county, and the provisions of section one thousand two hundred and twenty-two and one thousand two hundred and twenty-three apply to the proceedings upon the inquisition.

1226. If it is found by the inquisition that the female is not pregnant, the sheriff must execute the judgment; if it is found that the woman is pregnant, the sheriff must suspend the execution of the judgment, and transmit the inquisition to the governor. When the governor is satisfied that the female is no longer pregnant, he may issue his warrant appointing a day for the execution of the judgment.

1227. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had, on the application of the district attorney, must order the defendant to be brought before it, or, if he is at large, a warrant for his apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that the sheriff execute the judgment at a specified time. The sheriff must execute the judgment accordingly.

The Superior Court as successor of the District Court can make an order to carry into execution a judgment of death rendered by the District Court—54 Cal. 184. An order for execution made in the absence of defendant is erroneous—54 Cal. 92.

1228. The punishment of death must be inflicted by hanging the defendant by the neck until he is dead.

1229. A judgment of death must be executed within the walls or yard of a jail, or some convenient private place in the county. The sheriff of the county must be present at the execution, and must invite the presence of a physician, the district attorney of the county, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those men-

tioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

1230. After the execution, the sheriff must make a return upon the death-warrant, showing the time, mode, and manner in which it was executed.

TITLE IX.

Of Appeals to the Supreme Court.

- CHAP. I. APPEALS, WHEN ALLOWED AND HOW TAKEN,
AND THE EFFECT THEREOF, §§ 1235-46.
- II. DISMISSING AN APPEAL FOR IRREGULARITY,
§§ 1248-9.
- III. ARGUMENT OF THE APPEAL, §§ 1252-5.
- IV. JUDGMENT UPON APPEAL, §§ 1258-65.

CHAPTER I.

APPEALS, WHEN ALLOWED AND HOW TAKEN, AND THE EFFECT THEREOF.

- § 1235. Appeal, by whom taken, on questions of law alone.
- § 1236. Parties, how designated on appeal.
- § 1237. Appeal, when may be taken by the defendant.
- § 1238. In what cases by the people.
- § 1239. Appeals, within what time to be taken.
- § 1240. Appeal, how taken.
- § 1241. When notice may be served by publication.
- § 1242. Effect of an appeal by the people.
- § 1243. Effect of an appeal by the defendant.
- § 1244. Same.
- § 1245. Same.
- § 1246. Duty of clerks upon appeal.

1235. Either party in a criminal action amounting to a felony, may appeal to the Supreme Court, on questions of law alone, as prescribed in this chapter.

Appeal, when allowed.—The Supreme Court, under the Constitution, had jurisdiction on questions of law alone—55 Cal. 185. An appeal does not lie in cases of misdemeanor—53 Cal. 427. An appeal lies from a judgment for contempt, when the fine is for three hundred dollars—47 Cal. 109. A question of law is where the verdict is complained of as being contrary to the evidence, when there is no evidence to sustain the charge, not when there is evidence tending to prove it—55 Cal. 185. If an appeal has been given in all cases within the jurisdiction of the court, and afterward its jurisdiction is extended to new cases, an appeal will lie in those new cases—4 Mass. 462.

1236. The party appealing is known as the appellant, and the adverse party as the respondent, but the title of the action is not changed in consequence of the appeal.

1237. An appeal may be taken by the defendant:

1. From a final judgment of conviction.
2. From an order denying a motion for a new trial.
3. From an order made after judgment, affecting the substantial rights of the party.

In what cases defendant may take.—When the action of the court is manifestly erroneous under any and every conceivable state of the

facts, the Supreme Court will review the case, notwithstanding the evidence may not have been brought up—47 Cal. 405; 8 Id. 440; 34 Id. 663; 45 Id. 25; 32 Id. 213; 42 Id. 539. If the record discloses the fact that a written instrument introduced in evidence was a forgery, the point may be raised for the first time in the Supreme Court—26 Cal. 546. The action of the court in discharging a jury in a criminal case, because of its inability to agree, is subject to review by the appellate court—41 Cal. 219.

Subd. 1. Under this section an appeal can be taken from such orders only as are made after final judgment—42 Cal. 625. So, an appeal cannot be taken from an order made after a verdict of guilty, arresting the judgment—44 Cal. 385.

Subd. 2. The question whether a defendant in a criminal case is entitled to a new trial, on the ground that the verdict is contrary to the evidence, is one of law—31 Cal. 565. The general rule is, that the court will not review a judgment on this ground, unless the record contains a statement setting forth the material portions of the testimony, but if it states that it gives "in substance all that was proven on the part of the State," it is sufficient—9 Cal. 421. An appeal by defendant does not lie from an order granting a new trial—6 Pac. C. L. J. 1013.

Subd. 3. This section applies to orders made after final judgment which could not be reviewed upon an appeal from the judgment—44 Cal. 385; 42 Id. 625. Any error committed by the court in setting aside or modifying an erroneous order may be reviewed in a criminal case upon appeal, but not on habeas corpus—44 Cal. 34. Where a party is held in custody under an erroneous order, regular upon its face, which the court had power to make, he cannot be discharged on habeas corpus; his remedy is by appeal—44 Cal. 35; 41 Id. 211; 35 Id. 100. An appeal lies from an order for execution in a murder case—54 Cal. 93.

1238. An appeal may be taken by the people:

1. From a judgment for the defendant on a demurrer to the indictment or information.

2. From an order granting a new trial.

3. From an order arresting judgment.

4. From any order made after judgment, affecting the substantial rights of the people.

5. From an order of the court directing the jury to find for the defendant. [In effect April 9th, 1880.]

In what cases by the people.—By the just interpretation of this section, the right of appeal by the people must be confined to such cases only in which errors in the proceedings may occur before legal jeopardy has attached—38 Cal. 479. See Const. Prov. ante, p. 17; JEFFORDY, ante, § 1016. The action of the court in discharging a jury because of its inability to agree is subject to review—41 Cal. 212. The remedy is not by habeas corpus—41 Cal. 212.

Subd. 1. An order sustaining a demurrer is a final judgment from which an appeal will lie—39 Cal. 604; 8 Humph. 32; 9 Mo. 687. Query—6 Pac. C. L. J. 116. It lies from an order overruling a demurrer—45 Cal. 253.

Subd. 3. An appeal cannot be taken from an order made after a verdict of guilty, arresting the judgment—44 Cal. 385. Where no exception is taken to the denial of a motion in arrest of judgment, and

the record does not set out the evidence on which it was made, the appellate court will presume that the motion was properly overruled—40 Ala. 72.

Subd. 4. Error in setting aside or modifying an erroneous order may be reversed in a proper case on application, but it cannot be questioned on habeas corpus—44 Cal. 34. No appeal lies from an order directing a charge once ignored to be resubmitted to another grand jury. The only orders from which appeals lie are, orders made after final judgment; orders before that are reviewable only on appeal from the final judgment, or an order granting or refusing a new trial—42 Cal. 624; 44 id. 385. No appeal lies from an order of the judge admitting a party to bail under the provisions relating to habeas corpus—40 Cal. 637.

1239. An appeal from a judgment must be taken within one year after its rendition, and from an order, within sixty days after it is made.

Within what time taken.—An appeal from an order denying a new trial will be dismissed if taken more than sixty days after the order is made—53 Cal. 630.

1240. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party.

Appeal, how taken.—A notice of appeal must be filed with the clerk of the court, and served on the attorney of the adverse party either personally or by publication, as directed in the Code—49 Cal. 464. Where it appears that the notice was filed on a certain day, and the service admitted under the indorsement of filing, it will be presumed service was made on the day of filing—6 Pac. C. L. J. 465. A notice of appeal in a criminal case may be signed by any attorney authorized by defendant to take an appeal—6 Pac. C. L. J. 1014.

A recital that notice of application has been served and filed, is no evidence that an appeal has been taken—45 Cal. 45. The record must show that an appeal has in fact been taken, or the court will not be required to look into the case—45 Cal. 45. In the absence of statutory machinery for appeal, a case may be brought to the Supreme Court by writ of error—52 Cal. 220; 5 id. 190; 3 id. 247; 24 id. 334; but a writ of error will not lie when an appeal is given—24 Cal. 334; see 23 Cal. 93.

1241. If personal service of the notice cannot be made, the judge of the court in which the action was tried, upon proof thereof, may make an order for the publication of the notice in some newspaper, for a period not exceeding thirty days. Such publication is equivalent to personal service.

See ante, § 1240, note.

1242. An appeal taken by the people in no case stays or affects the operation of a judgment in favor of the defendant, until judgment is reversed.

PEN. CODE.—43.

1243. An appeal to the Supreme Court from a judgment of conviction, stays the execution of the judgment in all capital cases, and in all other cases upon filing with the clerk of the court in which the conviction was had, a certificate of the judge of such court, or of a justice of the Supreme Court, that, in his opinion, there is probable cause for the appeal, but not otherwise. [Approved March 30th, in effect July 1st, 1874.]

Effect of appeal.—Under the provisions of this section, bail should not be allowed after conviction, except by a judge of the court in which the conviction was had, or by a justice of the Supreme Court, and then, only when the circumstances are of an extraordinary character—49 Cal. 680; 54 id. 35; and as a matter of discretion—48 Cal. 5. If the judge of the court in which the conviction was had fails to certify that in his opinion there is probable cause for the appeal, and the justices of the Supreme Court are satisfied that no error has intervened, they will not grant such a certificate, and the appeal will not stay the execution—45 Cal. 305. See preceding sections.

1244. If the certificate provided for in the preceding section is filed, the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody, without executing the judgment, and detain him to abide the judgment on appeal.

See *ante*, § 1243, note.

1245. If before the granting of the certificate, the judgment has commenced, the further execution thereof is suspended, and upon service of a copy of such certificate the defendant must be restored, by the officer in whose custody he is, to his original custody.

See *ante*, § 1243, note.

1246. Upon the appeal being taken, the clerk with whom the notice of appeal is filed must, within ten days thereafter, in case the bill of exceptions has been settled by the judge before the giving of said notice, but if not, then within ten days from the settlement of the bill of exceptions, without charge, transmit to the clerk of the appellate court a copy of the notice of appeal, and of the record, and of all bills of exceptions, instructions, and endorsements thereon; and, upon the receipt thereof, the clerk of the appellate court must file the same, and per

form the same services as in civil cases, without charge.

[In effect April 9th, 1880.]

Duty of clerks.—The clerk with whom the application is filed, must, within ten days after, without charge, transmit to the clerk of the appellate court, a copy of the notice of appeal, and of the record, and of all bills of exceptions, instructions, and indorsements thereon—49 Cal. 649. The transcript may be filed with the clerk, without the payment of fees in advance. The clerk cannot refuse to render his services for the people on account of non-payment of fees—20 Cal. 76. Records filed in the Supreme Court are not merely *prima facie*, but are conclusive in character—43 Cal. 177. Where the record purports to set forth substantially all the evidence given at the trial, and there was no evidence tending to show the offense committed in the county, it is a fatal error—48 Cal. 382; 9 id. 422; but where facts, as proved, are given, there is no necessity of setting forth the testimony—9 Cal. 422. The action of the court below upon the instructions must be shown either by an indorsement thereon, or by a bill of exceptions—40 Cal. 287; 28 id. 218; 32 id. 91. The Supreme Court will not review the action of the court below unless the record contains a bill of exceptions or a correct statement of the facts which transpired at the trial, signed and settled by the judge—32 Cal. 92; see 28 id. 218; 10 id. 86; 6 id. 411; *ante*, § 1171. A statement of evidence, not a part of the bill of exceptions, certified by the judge, will not be considered—48 Cal. 255. The attorney-general should examine the record presented on appeal, to see if it is in a condition to be submitted—45 Cal. 45. After the transcript has been filed in the Supreme Court, it will not be sent back in order that the statement or bill of exceptions may be changed by a resettlement, except upon documentary evidence or admission of the alleged mistake or omission—18 Cal. 93. Errors in dates, copies of documents and the like, can be corrected by resettlement, and upon a proper showing the Supreme Court may send the record back to the court below for that purpose—18 Cal. 94. Where the cause was submitted without argument, no brief on file for appellant, and judgment affirmed, and after appeal there was a stipulation of respondent's counsel extending the time for filing a brief which had not been filed, the court will set aside the judgment, and restore the case to the calendar if the case be important. Counsel are, however, guilty of an irregularity in not filing the stipulation—50 Cal. 469. It is the duty of either party to bring the attention of the court to any alteration of the record of a pending proceeding, promptly and at the earliest convenience—50 Cal. 448.

CHAPTER II.

DISMISSING AN APPEAL FOR IRREGULARITY.

§ 1248. For what irregularity, and how dismissed.

§ 1249. Dismissal for want of a return.

1248. If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may, on any day, on motion of the respondent, upon five days' notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed. [In effect April 9th, 1880.]

1249. The court may also, upon like motion, dismiss the appeal, if the return is not made as provided in section one thousand two hundred and forty-six, unless for good cause they enlarge the time for the purpose.

CHAPTER III.

ARGUMENT OF THE APPEAL.

- § 1252. Appeals, when to be heard and determined.
- § 1253. Judgment cannot be reversed without argument.
- § 1254. Number of counsel to be heard.
- § 1255. Defendant need not be present.

1252. All appeals in criminal cases must be heard and determined by the appellate court, within sixty days after the record is filed in said appellate court, unless continued on motion or with the consent of the defendant. [In effect April 9th, 1880.]

1253. The judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear.

See 55 Cal. 298.

1254. Upon the argument of the appeal, if the offense is punishable with death, two counsel must be heard on each side, if they require it. In any other case the court may, in its discretion, restrict the argument to one counsel on each side.

See 55 Cal. 298.

1255. The defendant need not personally appear in the appellate court.

See 55 Cal. 298.

CHAPTER IV.

JUDGMENT UPON APPEAL.

- § 1258. Judgment without regard to technical errors.
- § 1259. What may be reviewed on an appeal by defendant.
- § 1260. May reverse, affirm, or modify the judgment, and order new trial.
- § 1261. New trial, where to be had.
- § 1262. Defendant discharged on reversal of judgment.
- § 1263. Judgment to be executed on affirmance.
- § 1264. Judgment of appellate court, how entered and remitted.
- § 1265. Jurisdiction ceases after judgment remitted.

1258. After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.

Technical errors and defects.—On the hearing on appeal, the court will give judgment without regard to technical errors or defects, or to exceptions which do not affect substantial rights—33 Cal. 491. A technical error is not sufficient, of itself, to reverse a judgment. It must be such as produces injury to the substantial rights of the defendant, and on him is cast the burden of showing it—47 Cal. 404. Objections to an indictment on the ground of omission of certain words, or of uncertainty in the form of the indictment, cannot be raised for the first time in the Supreme Court—20 Cal. 146. The appellate court will not reverse a judgment by reason of an alleged error in a proceeding had on the trial, by express agreement of defendant and his counsel, unless bound so to do by some controlling rule of law—28 Cal. 465; nor by reason of errors which do not affect the substantial rights of the parties—32 Cal. 213; 34 id. 191; 50 id. 470. An error of court, to be ground for reversal of the judgment, must affect the substantial rights of the defendant, and the burden is on him to show that such is the case—47 Cal. 338. An error in reference to allowing defendant to ask a question is cured by afterward permitting a witness to answer the same question—48 Cal. 82. Entering an order in vacation instead of term time, even if irregular, does not work any injustice—44 Cal. 95. A judgment will not be disturbed on account of an erroneous instruction which was not applicable to the facts of the case—6 Cal. 543. Defendant cannot complain of an instruction which does no injury—49 Cal. 7. A mere want of perspicuity in an instruction which does not injure the prisoner, will not authorize a reversal—3 Cal. 90. Although some of the instructions may not state the law with precise accuracy, yet, if taken as a whole they are substantially correct and could not have misled the jury, judgment will not be disturbed—49 Cal. 580.

Where the instructions given fairly and fully explain the law applicable to the questions actually tried, and which the jury were called

on to decide, judgment will be affirmed notwithstanding many specific instructions were asked and refused—50 Cal. 450. Judgment will not be reversed because the jury were not charged by the court as provided by § 1122, unless it is shown that defendant sustained some injury—23 Cal. 631. Where there is evidence of the good character of the defendant, to instruct that evidence of character can only be considered in cases where the guilt is doubtful is error; yet if the evidence conclusively shows guilt, that no amount of good character could have changed the result, such error does no injury—45 Cal. 288; 44 id. 291.

A defendant cannot complain that the court did not instruct on a point in issue, unless he asked and was refused—48 Cal. 237; 44 id. 96. An error on refusing an instruction is cured if the instruction is substantially given in the charge to the jury—50 Cal. 470; 53 id. 630; 54 id. 336; 41 id. 66; 47 id. 95; but an erroneous instruction is not cured by a correct statement of the law in another part of the charge—43 Cal. 552; 54 id. 151. See 53 Cal. 495.

1259. Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment.

Review on appeal from judgment.—This section was clearly intended to prohibit a separate appeal from intermediate orders or proceedings—42 Cal. 625. Any action of the court which deprives defendant of a substantial legal right, is to his prejudice, or to any extent withholds or abridges a substantial, legal or constitutional privilege, by him claimed on the trial, is proper matter for review—42 Cal. 167; 13 id. 584; see 42 id. 623; as orders on motions for continuance—6 id. 246; or an order directing that a criminal charge, ignored by the grand jury, be submitted to another, is not appealable—42 id. 625; see 44 id. 385; 44 id. 92.

1260. The court may reverse, affirm, or modify the judgment or order appealed from, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial.

Presumptions.—Error will not be presumed—45 Cal. 261. Mere intendments indulged in the appellate court are in support of the proceedings below, so far as such intendments are consistent with the record—47 Cal. 404; 27 id. 514; 43 Ala. 65; 7 Mo. 293. If the record fails to show arraignment and plea to the indictment, the court will assume that there was no arraignment or plea—52 Cal. 479. It will be presumed that the testimony introduced by the prosecution worked no injury to the defendant, if the testimony is not contained in the record—47 Cal. 402. Where one willfully suppresses testimony, the presumption is that such testimony, if produced, would be adverse to him. But in the absence of a purpose to suppress, the presumption does not arise—6 Pac. C. L. J. 166; see *ante*, § 1102, note PRESUMPTIVE EVIDENCE.

It will be presumed that oral instructions given by the court were taken down by the shorthand reporter when nothing is shown to the contrary—6 Pac. C. L. J. 610. The presumption is that the evidence in the court below sustained the verdict—27 Cal. 248; 89 Ill. 604; 80 id. 32. Where the indictment contains several counts, each charging a distinct offense, it will be presumed that judgment was pronounced for

the offense to which the evidence was directed and was applicable—27 Cal. 394. The presumptions are in favor of the sentence—27 Cal. 394; 37 Ala. 152; 4 Zab. 843. Where no objection is made to the verdict, but the sentence is defective, the judgment will be reversed without disturbing the verdict, and the cause remanded with directions to pronounce the proper sentence—3 Smedes & M. 518. Where error intervenes, it is presumed to be injurious, and judgment should be reversed unless the contrary appears—47 Cal. 105; 18 Id. 187; 6 Parker Cr. R. 155; but not if during subsequent proceedings the foundation of the error is overthrown—26 Id. 129.

Erroneous instructions.—It is error in the court, in the absence of a phonographic reporter, to instruct the jury orally without the consent of the defendant—53 Cal. 575; 45 Id. 254. It is error *per se* to charge the jury orally without the consent of defendant—6 Cal. 246; 8 Id. 341; Id. 423; 12 Id. 345; 26 Id. 78; 43 Id. 29, 35; 44 Id. 186; 37 Id. 274. It will not be presumed that the court below charged orally because the record does not state that the charge was given in writing—45 Cal. 261; 28 Id. 435; 25 Id. 535. The presumption is that the charge is in writing unless the contrary appears—28 Cal. 486; 25 Id. 531; 17 Id. 322. Where an instruction is confused and uncertain, or fails distinctly to lay down the law, while at the same time it contains hypothetical suggestions of the defendant's guilt, it is injurious to the rights of the party on trial—6 Pac. C. L. J. 166.

Remarks of the judge prejudicial to the accused, although he afterward instructed the jury to disregard them, is very grave error—6 Pac. C. L. J. 819. Error in instructions will not be reviewed unless the instructions are embodied in a bill of exceptions, or there is an indorsement thereon, signed by the judge, showing the action of the court—23 Cal. 214; 40 Id. 286. Instructions calculated to influence the jury upon their authority to limit the punishment for murder in the first degree should be pertinent, and have reference to the evidence—51 Cal. 495; 49 Id. 181. It will be assumed that the instruction was correct, if legal and proper in any conceivable state of the evidence legally admissible on the point—53 Cal. 420.

Where the evidence to which an instruction relates does not appear on the record, the presumption is in favor of its correctness—47 Cal. 124. A useless instruction is not necessarily erroneous—53 Cal. 420. Defendant cannot complain of an instruction which does no injury—49 Cal. 7. It cannot be assumed that a jury understands an instruction given by the court in a sense different from that in which it is commonly understood—49 Cal. 181.

Error in refusing and giving instructions.—It is not error to refuse an instruction based on a statement of facts not in evidence—47 Cal. 106; 50 Id. 570; nor to refuse to give an instruction which is already substantially given—41 Id. 66; or, where there is no evidence to sustain the hypothesis to which it is directed—6 Pac. C. L. J. 938. The refusal to give instructions which assume that no other than circumstantial evidence was introduced by the prosecution, will not be held erroneous, if the record fails to show that none but circumstantial evidence was introduced—47 Cal. 406. When no evidence is brought up with the record, it will be assumed that evidence was introduced, rendering a modification of the instruction necessary—53 Cal. 420. An addition to an instruction given, which does not change or modify the sense, but states a further principle germane to the point, is not error—47 Cal. 95; 30 Id. 448.

Judicial discretion.—Judicial discretion will not be interfered with, unless it is abused—41 Cal. 462. Where the record shows that the accused was detained upon the recommendation of the grand jury alone, the presumption that the discretion of the court was exercised, cannot be indulged—42 Cal. 200. The court having complete appellate power, it is not to be supposed that it will trust implicitly in the discretion of inferior courts—5 Cal. 353.

When judgment not disturbed.—Error must affirmatively appear, or the Supreme Court will not reverse the judgment—6 Cal. 202; 16 id. 98; 17 id. 214; id. 363; id. 389; 19 id. 426; 27 id. 507; 43 id. 55; id. 176. Where no one appeared for appellant, nor were any points or authorities filed, and no error appearing, judgment will be affirmed—6 Pac. C. L. J. 160. Questions of mere error cannot be inquired into—44 Cal. 580. Errors on abstract principles of law will not be considered by the Supreme Court—43 Cal. 451. In the absence of a bill of exceptions, the court is unable to determine whether it would, if settled and signed, tend to manifest any error committed at the trial—14 Cal. 510; 18 id. 432; 46 id. 54; Busb. 217. Intendments go to the support of the action of the court below, where no portion of the evidence is brought up—43 Cal. 168. If the testimony is not in the record, a judgment will not be reversed for error in instructions, if, from the nature of the case, testimony might have been introduced which would have warranted them—46 Cal. 303; 45 id. 322.

New trial.—Where instructions are contradictory on a material point, there should be a new trial—44 Cal. 69; 30 id. 316; 39 id. 577; 43 id. 552; 11 id. 161; 1 id. 354. Where the verdict is against the evidence, the judgment should be set aside—6 Pac. C. L. J. 819. If there is a substantial conflict of evidence, the verdict will not be disturbed—53 Cal. 577; 50 id. 306. If the verdict finding the accused guilty is not clearly sustained by the evidence, the judgment will be reversed—36 Cal. 531. The judgment will not be disturbed on the ground that evidence is insufficient to justify the verdict, unless there is either a total deficiency of evidence, or it preponderated so greatly against the verdict as to render it clear that the jury must have acted under the influence of passion or prejudice—48 Cal. 337; but the Supreme Court will not deal with the question of mere preponderance of evidence—47 id. 101. Where, on appeal from an order granting a new trial, there is no evidence to show that the affidavits contained in the transcript were used or referred to on the motion, the question will not be considered—42 Cal. 539; see 6 Pac. C. L. J. 483. On appeal from an order granting a new trial, the appellate court is confined to a review of the proceedings between issue joined and the rendition of the verdict—39 Cal. 370.

1261. When a new trial is ordered, it must be directed to be had in the court of the county from which the appeal was taken.

1262. If a judgment against the defendant is reversed without ordering a new trial, the appellate court must, if he is in custody, direct him to be discharged therefrom; or if on bail, that his bail be exonerated; or if money was deposited instead of bail, that it be refunded to the defendant.

1263. If a judgment against the defendant is affirmed, the original judgment must be enforced.

1264. When the judgment of the appellate court is given, it must be entered in the minutes, and a certified copy of the entry forthwith remitted to the clerk of the court from which the appeal was taken.

Judgment to be remitted.—The judgment of the appellate court is required to be certified to the lower court, that the original judgment may be carried into effect, as directed by the appellate tribunal—41 Cal. 211.

1265. After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the certificate is remitted.

Jurisdiction, when ceases.—After remittitur, the Supreme Court loses all jurisdiction, and the lower court can make all orders necessary to carry the judgment into execution by proceedings in the lower court—41 Cal. 211. Upon the affirmance of an order or judgment, no order of the appellate court is necessary directing the court below to enforce judgment—39 Cal. 102. After judgment affirmed, a second commitment need only recite the judgment of conviction, that defendant appealed, and judgment was affirmed. It need not recite the judgment of the lower court, or that the remittitur had been issued—41 Cal. 210. *Nisi prius* courts cannot set aside or disregard declarations of the Supreme Court, because it may seem to them unsound—45 Cal. 51.

TITLE X.

Miscellaneous Proceedings.

- CHAP. I. BAIL, §§ 1268-1317.
- II. WHO MAY BE WITNESSES IN CRIMINAL ACTIONS, §§ 1321-3.
- III. COMPELLING THE ATTENDANCE OF WITNESSES, §§ 1326-33.
- IV. EXAMINATION OF WITNESSES CONDITIONALLY, §§ 1335-46.
- V. EXAMINATION OF WITNESSES ON COMMISSION, §§ 1349-62.
- VI. INQUIRY INTO THE INSANITY OF THE DEFENDANT BEFORE TRIAL OR AFTER CONVICTION, §§ 1367-73.
- VII. COMPROMISING CERTAIN PUBLIC OFFENSES BY LEAVE OF THE COURT, §§ 1377-9.
- VIII. DISMISSAL OF THE ACTION, BEFORE OR AFTER INDICTMENT, FOR WANT OF PROSECUTION OR OTHERWISE, §§ 1382-7.
- IX. PROCEEDINGS AGAINST CORPORATIONS, §§ 1390-7.
- X. ENTITLING AFFIDAVITS, § 1401.
- XI. ERRORS AND MISTAKES IN PLEADINGS AND OTHER PROCEEDINGS, § 1404.
- XII. DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED, §§ 1407-13.
- XIII. REPRIEVES, COMMUTATIONS, AND PARDONS, §§ 1417-23.

CHAPTER I.

BAIL.

ART. I. *In what cases the defendant may be admitted to bail.*

- II. *Bail upon being held to answer before indictment.*
- III. *Bail upon an indictment before conviction.*
- IV. *Bail on appeal.*
- V. *Deposit instead of bail.*
- VI. *Surrender of the defendant.*
- VII. *Forfeiture of the undertaking of bail or of the deposit of money.*
- VIII. *Recommitment of the defendant after having given bail or deposited money instead of bail.*

ARTICLE I.

In what cases the defendant may be admitted to bail.

- § 1268. Admission to bail defined.
- § 1269. Taking of bail defined.
- § 1270. Offense not bailable.
- § 1271. Defendant when admitted to bail before conviction.
- § 1272. When admitted to bail after conviction and upon appeal.
- § 1273. Nature of bail.
- § 1274. When bail is matter of discretion, notice of application must be given to district attorney.

1268. Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail.

Admission to bail—See 54 Cal. 103. Release on bail is not imprisonment during the period of such release—41 Cal. 210. See *ante*, §§ 82, note, 874.

1269. The taking of bail consists in the acceptance, by a competent court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant, accord-

ing to the terms of the undertaking, or that the bail will pay to the people of this State a specified sum.

Taking bail defined.—A prisoner arrested for felony must, in order to procure bail, be taken before the magistrate who issued the warrant, or some other magistrate in the same county—54 Cal. 103. In fixing the amount of bail, the sole purpose should be to cause the appearance of the accused to answer the charge—54 Cal. 75; see *ante*, § 822. The sum of one hundred and twelve thousand dollars is not excessive for ten distinct felonies, such being the amount alleged to have been taken by the prisoner by reason of said felonies—53 Cal. 410. Fifteen thousand dollars is not excessive on the charge of assault to murder—44 Cal. 555. See *ante*, § 822.

1270. A defendant charged with an offense punishable with death cannot be admitted to bail, when the proof of his guilt is evident or the presumption thereof great. The finding of an indictment does not add to the strength of the proof or the presumptions to be drawn therefrom.

Offense not bailable.—Admission to bail in capital cases, where the proof is evident and the presumption great, may be made matter of discretion, or may be forbidden by legislation—19 Cal. 541; 54 Cal. 103; Const. Prov. *ante*, page 15. See *ante*, § 821.

1271. If the charge is for any other offense, he may be admitted to bail before conviction, as a matter of right.

Bail as matter of right.—In all other than capital cases, bail is a matter of right—see 54 Cal. 103; Const. Prov. *ante*, page 15. Where the jury are unable to agree upon a verdict, and were discharged without consent, thereby protracting defendant's confinement in addition to long imprisonment before trial, he should be admitted to bail—41 Cal. 220. The practice of admitting persons charged with felony to bail, without an examination of witnesses for the people, is unauthorized by statute—39 Cal. 705. The constitution declaring bail a matter of right, contemplates only those cases in which the party has not been convicted—41 Cal. 29; 7 Peters, 568.

1272. After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail—

1. As a matter of right, when the appeal is from a judgment imposing a fine only.

2. As a matter of discretion in all other cases.

Admission to bail is a matter in the discretion of the judge—48 Cal. 3; id. 553; 41 id. 30; 44 id. 555; and it ought in the first instance to be exercised by the court or judge who tried the case—48 Cal. 553. Statutes making bail after conviction a matter of discretion, are constitutional—41 Cal. 29. It is a discretion measured by legal rules and by reference to the analogies of the law—49 Cal. 680; 48 id. 5.

PEN. CODE.—44.

1273. If the offense is bailable, the defendant may be admitted to bail before conviction—

1. For his appearance before the magistrate, on the examination of the charge, before being held to answer.

2. To appear at the court to which the magistrate is required to return the depositions and statement, upon the defendant being held to answer after examination.

3. After indictment, either before the bench-warrant is issued for his arrest, or upon any order of the court committing him, or enlarging the amount of bail, or upon his being surrendered by his bail to answer the indictment in the court in which it is found, or to which it may be transferred for trial.

And after conviction, and upon an appeal—

1. If the appeal is from a judgment imposing a fine only, on the undertaking of bail that he will pay the same, or such part of it as the appellate court may direct, if the judgment is affirmed or modified, or the appeal is dismissed.

2. If judgment of imprisonment has been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case the judgment be reversed, and that the cause be remanded for a new trial, that he will appear in the court to which said cause may be remanded, and submit himself to the orders and process thereof.

[Approved February 15th, 1876.]

See *ante*, § 1269, and note.

Subd. 3. If a party be committed for an alleged offense, and an indictment be found against him, in a proceeding as to increasing or diminishing his bail, his guilt will be presumed—44 Cal. 557; see 54 *id.* 80; 19 *id.* 539; and see *ante*, § 1270.

1274. When the admission to bail is a matter of discretion, the court or officer to whom the application is made must require reasonable notice thereof to be given to the district attorney of the county.

ARTICLE II.

Bail upon being held to answer before indictment.

- § 1277. What magistrates may admit to bail.
- § 1278. Bail, how put in, and form of the undertaking.
- § 1279. Qualifications of bail.
- § 1280. Bail, how to justify.
- § 1281. On allowance of bail, defendant to be discharged.

1277. When the defendant has been held to answer upon an examination for a public offense, the admission to bail may be by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus.

1278. Bail is put in by a written undertaking, executed by two sufficient sureties, (with or without the defendant, in the discretion of the magistrate) and acknowledged before the court or magistrate, in substantially the following form:

"An order having been made on the — day of —, A. D. eighteen —, by A. B., a justice of the peace of — county, (or as the case may be) that C. D. be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been admitted to bail in the sum of — dollars; we, E. F. and G. H., (stating their place of residence, and occupation) hereby undertake that the above named C. D. will appear and answer the charge above mentioned, in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment, and render himself in execution thereof; or, if he fails to perform either of these conditions, that we will pay to the people of the State of California the sum of — dollars" (inserting the sum in which the defendant is admitted to bail.)

Bail-bond.—Bail is taken by a recognizance executed by sureties, and the accused need not sign it, and upon forfeiture the proceedings on the recognizance can only be by action against the sureties—19 Cal. 576. A bail-bond need not state in what court defendant shall appear, as the

law provides in what court he shall be tried—7 Cal. 402. This section applies to the bond to be given for appearance before the magistrate on examination—54 Cal. 408. The recital in the bail-bond is conclusive on the obligors—54 Cal. 408. The liability of the sureties attaches as soon as the party is released, and it is fixed by a breach of its conditions and a forfeiture declared and entered in the court—37 Cal. 271. The justification forms no part of the contract—37 Cal. 271; and no indorsement of approval on the recognizance is necessary—37 id. 271; see 18 id. 498.

1279. The qualifications of bail are as follows:

1. Each of them must be a resident, householder, or freeholder within the State; but the court or magistrate may refuse to accept any person as bail who is not a resident of the county where bail is offered.

2. They must each be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court or magistrate, on taking bail, may allow more than two sureties to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to that of sufficient bail.

1280. The bail must in all cases justify by affidavit taken before the magistrate, that they each possess the qualifications provided in the preceding section. The magistrate may further examine the bail upon oath concerning their sufficiency, in such manner as he may deem proper.

1281. Upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the proper officer, the defendant must be discharged.

Release of prisoner.—An oral order of a police judge from the bench that the prisoner be released, certified by the clerk to the prison-keeper, and followed by his release, is a sufficient compliance with the statute, and renders the bond obligatory—54 Cal. 408.

Authority over person of defendant.—If bail has been previously taken, and is deemed sufficient security, the court may permit it to stand; if not, the court may order defendant into custody—35 Cal. 107.

ARTICLE III.

Bail upon an indictment before conviction.

- § 1284. When offense is not capital.
- § 1285. When the offense is capital.
- § 1286. Bail on habeas corpus.
- § 1287. Form of undertaking.
- § 1288. Sections applicable to qualifications, etc.
- § 1289. Increase or reduction of bail.

1284. When the offense charged is not punishable with death, the officer serving the bench-warrant must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail. [In effect April 9th, 1880.]

1285. If the offense charged is punishable with death, the officer arresting the defendant must deliver him into custody, according to the command of the bench-warrant. [In effect April 9th, 1880.]

1286. When the defendant is so delivered into custody, he must be held by the sheriff, unless admitted to bail on examination upon a writ of habeas corpus.

1287. The bail must be put in by a written undertaking, executed by two sufficient sureties, (with or without the defendant, in the discretion of the court or magistrate) and acknowledged before the court or magistrate, in substantially the following form:

"An indictment having been found on the — day of —, A. D. eighteen —, in the County Court of the county of —, charging A. B. with the crime of —, (designating it generally) and he having been admitted to bail in the sum of — dollars, we, C. D. and E. F., of — (stating their place of residence and occupation) hereby undertake that the above named A. B. will appear and answer the indictment above mentioned, in whatever court it may be prosecuted, and will at all times render himself amenable to the orders and process of the court,

and, if convicted, will appear for judgment and render himself in execution thereof; or, if he fails to perform either of these conditions, that we will pay to the people of the State of California the sum of — dollars " (inserting the sum in which the defendant is admitted to bail).

Undertaking.—The justification forms no part of the contract, and in no manner affects the liability of the sureties—37 Cal. 271. See *ante*, 1278, note; and *post*, § 1473, *et seq.*

1288. The provisions contained in sections twelve hundred and seventy-nine, twelve hundred and eighty, and twelve hundred and eighty-one, in relation to bail before indictment, apply to bail after indictment. [Approved March 30th, in effect July 1st, 1874.]

1289. After a defendant has been admitted to bail upon an indictment or information, the court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount be increased, the court may order the defendant to be committed to actual custody, unless he give bail in such increased amount. If application be made by the defendant for a reduction of the amount, notice of the application must be served upon the district attorney. [In effect April 9th, 1880.]

ARTICLE IV.

Bail on appeal.

§ 1291. Who may admit to bail.

§ 1292. Bail, qualifications of, and condition of undertaking.

1291. In cases in which defendant may be admitted to bail upon an appeal, the order admitting him to bail may be made by any magistrate having the power to issue a writ of habeas corpus, or by the magistrate before whom the trial was had. [In effect February 25th, 1878.]

Increasing and reducing bail.—The authority and discretion of the court having jurisdiction of the offense, should be exercised in admitting to bail, increasing or reducing bail, and whenever substantial justice may thereby be promoted—44 Cal. 537. Upon an application after commitment for reduction of bail, the court or judge is not authorized to interfere unless the bail is unreasonably great and clearly

disproportionate to the offense. A mere difference between the judge and the committing magistrate is not sufficient to justify—54 Cal. 75; 44 id. 555. Upon an application to reduce bail after an indictment, the guilt of the prisoner is presumed—54 Cal. 80; 44 id. 555. See *ante*, § 1273, and note.

Bail on appeal.—Admission to bail, pending appeal, after conviction for felony, is a matter of discretion and should not be allowed except under extraordinary circumstances—54 Cal. 75; 49 id. 681. Pending appeal, a judge may admit to bail a prisoner convicted and sentenced for manslaughter—48 Cal. 553. One who applies on *habeas corpus*, pending an appeal after a conviction for manslaughter, must, in his petition, state facts on which the court can exercise an intelligent discretion, such as, that injustice has been done him during the trial, and that the appeal has been taken in good faith and the like—41 Cal. 30. The authority of the superior judge, in case the writ of *habeas corpus* is made returnable before him, is the same as the authority of the supreme judge issuing the writ—51 Cal. 318; 49 id. 683.

See *ante*, §§ 852-4, 829, 862, 874-5, 962-5.

1292. The bail must possess the qualifications, and must be put in, in all respects, as provided in article two of this chapter, except that the undertaking must be conditioned as prescribed in section twelve hundred and seventy-three, for undertakings of bail on appeal.

ARTICLE V.

Deposit instead of bail.

§ 1295. Deposit, when and how made.

§ 1296. May, after bail is given and before forfeiture.

§ 1297. Deposit to be applied to payment of judgment and fine.

1295. The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk of the court in which he is held to answer, the sum mentioned in the order, and upon delivering to the officer in whose custody he is a certificate of the deposit, he must be discharged from custody.

1296. If the defendant has given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the recognizance, and upon the deposit being made the bail is exonerated.

1297. When money has been deposited, if it remains on deposit at the time of a judgment for the payment of a fine, the county clerk must, under the direction of the

court, apply the money in satisfaction thereof, and after satisfying the fine and costs, must refund the surplus, if any, to the defendant.

ARTICLE VI.

Surrender of the defendant.

§ 1300. Surrender, by whom, when, and how made.

§ 1301. Defendant, how surrendered.

§ 1302. Return of deposit on surrender.

1300. At any time before the forfeiture of their undertaking the bail may surrender the defendant in their exoneration, or he may surrender himself, to the officer to whose custody he was committed at the time of giving bail, in the following manner:

1. A certified copy of the undertaking of the bail must be delivered to the officer, who must detain the defendant in his custody thereon as upon a commitment, and by a certificate in writing acknowledge the surrender.

2. Upon the undertaking and the certificate of the officer, the court in which the action or appeal is pending may, upon notice of five days to the district attorney of the county, with a copy of the undertaking and certificate, order that the bail be exonerated, and on filing the order and the papers used on the application, they are exonerated accordingly.

1301. For the purpose of surrendering the defendant, the bail, at any time before they are finally discharged, and at any place within the State, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

1302. If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, surrenders himself to the officer to whom the commitment was directed, in the manner provided in the last two sections, the court must order a return of the deposit

to the defendant, upon producing the certificate of the officer showing the surrender, and upon a notice of five days to the district attorney, with a copy of the certificate.

ARTICLE VII.

Forfeiture of the undertaking of bail or of the deposit of money.

§ 1305. How forfeited, and how forfeiture discharged.

§ 1306. Forfeiture to be enforced by action.

§ 1307. Deposit, when forfeited, how disposed of.

1305. If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the undertaking of bail, or the money deposited instead of bail, as the case may be, is thereupon declared forfeited. But if at any time before the final adjournment of the court, the defendant or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just.

1306. If the forfeiture is not discharged, as provided in the last section, the district attorney may at any time after the adjournment of the court proceed by action only against the bail upon their undertaking.

1307. If, by reason of the neglect of the defendant to appear, money deposited instead of bail is forfeited, and the forfeiture is not discharged or remitted, the clerk with whom it is deposited must, immediately after the final adjournment of the court, pay over the money deposited to the county treasurer.

ARTICLE VIII.

Recommitment of the defendant, after having given bail or deposited money instead of bail.

- § 1310. In what cases.
- § 1311. Contents of order.
- § 1312. Defendant may be arrested in any county.
- § 1313. If for failure to appear, defendant must be committed.
- § 1314. If for other cause, he may be admitted to bail.
- § 1315. Bail in such case, by whom taken.
- § 1316. Form of the undertaking.
- § 1317. Bail must possess what qualifications, and how put in.

1310. The court to which the committing magistrate returns the depositions, or in which an indictment, information, or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, direct the arrest of the defendant and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged, in the following cases:

1. When, by reason of his failure to appear, he has incurred a forfeiture of his bail, or of money deposited instead thereof.
2. When it satisfactorily appears to the court that his bail, or either of them, are dead or insufficient, or have removed from the State.
3. Upon an indictment being found or information filed in the cases provided in section nine hundred and eighty-five. [In effect April 9th, 1880.]

1311. The order for the recommitment of the defendant must recite generally the facts upon which it is founded, and direct that the defendant be arrested by any sheriff, constable, marshal, or policeman, in this State, and committed to the officer in whose custody he was at the time he was admitted to bail, to be detained until legally discharged.

1312. The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county, in the same manner as upon a warrant of arrest, except that when arrested in another county the order need not be indorsed by a magistrate of that county.

1313. If the order recites, as the ground upon which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirement of the order.

1314. If the order be made for any other cause, and the offense is bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order.

1315. When the defendant is admitted to bail, the bail may be taken by any magistrate in the county having authority in a similar case to admit to bail, upon the holding of the defendant to answer before an indictment, or by any other magistrate designated by the court.

1316. When bail is taken upon the recommitment of the defendant, the undertaking must be in substantially the following form:

"An order having been made on the — day of —, A. D. eighteen —, by the court, (naming it) that A. B. be admitted to bail in the sum of — dollars, in an action pending in that court against him in behalf of the people of the State of California, upon an (information, presentment, indictment, or appeal, as the case may be), we, C. D. and E. F., of (stating their places of residence and occupation), hereby undertake that the above named A. B. will appear in that or any other court in which his appearance may be lawfully required upon that (information, presentment, indictment, or appeal, as the case may be), and will at all times render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof; or, if he fails to per-

form either of these conditions, that we will pay to the people of the State of California the sum of — dollars," (insert the sum in which the defendant is admitted to bail).

1317. The bail must possess the qualifications, and must be put in, in all respects, in the manner prescribed in article two of this chapter.

CHAPTER II.

WHO MAY BE WITNESSES IN CRIMINAL ACTIONS.

- § 1321. Who are competent witnesses.
- § 1322. When husband and wife are not competent witnesses.
- § 1323. When the defendant is not a competent witness.

1321. The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code.

Witnesses.—Rules for determining the competency of witnesses—47 Cal. 125. The Act of 1866, authorizing accused persons to become witnesses in their own behalf, had no application to examinations before committing magistrates—43 Cal. 559; but this act has been abolished by this section of the Code—47 id. 166; and if a person accused of crime voluntarily and freely offers himself as a witness at his preliminary examination, without undue influence, his testimony may be used in evidence against him on his trial—id. The restriction upon the competency of a witness must be strictly construed in favor of life, liberty, and public justice—27 Cal. 638.

Witnesses, who competent.—All persons who are disinterested and not infamous, are competent witnesses, and are presumed to be so until the contrary is shown—7 Eng. 782. The attorney who acted for defendant on the preliminary examination, but not retained at the trial, is a competent witness—14 Gray, 402. A person deaf and dumb may testify by signs, through an interpreter—8 Conn. 93. So, an informer is a competent witness—3 McLean, 53; id. 299. A juror is not incompetent as a witness in a proper case, but he cannot impeach his own verdict—48 Cal. 90; 53 id. 491; 2 Halst. 244.

If a lunatic has such a share of understanding as enables him to remember the events, and has a knowledge of right and wrong, he is competent—25 Gratt. 865. If a child under the age of seven years has sufficient knowledge of the nature and circumstances of an oath, he may be a witness—2 Ala. 275; and this is to be determined by the court—id.; 2 Allen, 295; see 47 Ga. 524; 31 Ind. 90; 3 Brev. 339.

Where a boy nine years of age stated that he did not know the nature of an oath, he is not competent—6 Parker Cr. R. 126. Being under twenty-one years of age is not such proof of another's control as to avail in a trial for larceny—29 Cal. 414. The officer who arrested the prisoner is a competent witness—Thach. C. C. 1. So, of a person who aided the officer in the arrest—8 Ill. 368. A prosecutor is a competent witness for the State—Walk. 7; but see 3 Dana, 475. A person from whom goods have been stolen is a competent witness—9 Mass. 30; 1 Nott. & McC. 91; but not when entitled to treble the value of the property stolen—14 N. H. 464.

A person convicted of an infamous crime is a competent witness before sentence—2 McLean, 325; 7 Ired. 225; and one convicted in another State is not, therefore incompetent—23 Ala. 44; 6 Gratt. 706;

but see 3 Hawks, 393. In New York, a person convicted of perjury is not competent to be a witness—1 Parker Cr. R. 241; but a person convicted of petit larceny as a first offense, is not incompetent—22 N. Y. 317. In Massachusetts, a person convicted of larceny is incompetent to testify—8 Met. 531.

In general, a codefendant cannot be a witness until he has ceased to be a party, by acquittal or entry of *nolle prosequi* as to him, or otherwise—10 Johns. 95; 15 Mo. 28; 16 Id. 385; 39 N. H. 283. The discharge must be at the trial before defendant has gone into his defense, by the court of its own motion, or on application of the district attorney—48 Cal. 253. A codefendant on a separate trial is not entitled to have his codefendant as a witness—9 N. Y. 38; 5 Parker Cr. R. 119; but one jointly indicted with another is competent—6 Parker Cr. R. 114; 1 Ga. 610; see 37 Miss. 422; 39 Id. 570.

An accomplice should not be made a witness without an order of the court, on application, showing that there is no other witness by whom the offense can be proved—1 Iowa, 316; 9 Cowen, 797; 2 Va. Cas. 493; 4 Wash. C. C. 428. He may be a witness when tried separately—6 Mo. 1; and he is not discharged from punishment by voluntarily giving his evidence—11 Fla. 247; so, the principal may be a witness against the accessory—2 Barb. 216. Where two are jointly indicted, the husband of one is not a competent witness for the other, before conviction or acquittal—1 Doug. (Mich.) 48; 3 Wis. 823; see 2 Humph. 59. So, as to the wife on her separate trial—1 Wheel. C. C. 479; but by statute a husband or wife may be compelled to testify against each other—63 Me. 210; and see 64 N. C. 614.

A State may legislate as to the rules of evidence—40 Cal. 196; Id. 240. That a Chinaman cannot be a witness against a white man, does not change the rules of evidence either as to admission of testimony or of proof necessary to convict—31 Cal. 573. The testimony of a Chinese witness is not admissible, under the existing law, against a white person, but under the Code the rule was changed—45 Cal. 57. The fourteenth amendment of the Federal Constitution does not conflict with the power of the Legislature as to the exclusion of testimony in the State courts—40 Cal. 207; overruling 36 Cal. 658. See 17 Cal. 63; 27 Id. 638.

It is not a valid objection to a witness that his name is not entered on the indictment—19 Cal. 426; 22 Id. 348; 29 Id. 562; but it may be a ground for postponement—6 Cal. 96. The competency of a witness is not affected by his religious belief—3 McLean, 175; 1 Swan, 411; 2 Ill. 29; see 43 Cal. 29; 3 Gratt. 632. A party may show a want of competency in a witness by examining him on his *voir dire*, or prove it by other testimony—see 26 Cal. 129. See Code of Civ. Proc. §§ 1878-1381.

Testimony of experts.—There is no rule of law fixing the precise amount of experience or degree of skill necessary to constitute an expert—105 Mass. 62; see 14 Gray, 335. Professional witnesses can only give their opinion on questions of skill or science—1 Denio, 282; 1 Parker Cr. R. 464; 4 Zab. 843; but their opinions as experts derived from books are not admissible in evidence—53 N. H. 484; 12 Rich. 321.

A medical or other professional witness cannot give opinions outside of his art or profession—17 Ohio St. 515. An expert, after having made a *post mortem* examination of the body of a female, may give his opinion that she had been pregnant, and an opinion as to the cause of her death—32 Me. 369. An expert cannot be permitted to give a mere opinion not based on facts—21 Cal. 261; 23 Tex. 331. When the facts are disputed, the question should be stated hypothetically—46 Mo. 224. An expert who has heard only a portion of the evidence, cannot testify to an opinion based on such portion—9 Kan. 237. An expert who has heard the whole evidence, cannot give his opinion as to the effect of such evidence—1 Wis. 178. Where an interpreter is

employed, and there is a dispute as to the meaning of a word, the accused is entitled to introduce evidence as to the meaning of the word—23 Ill. 17.

When a witness is examined as an expert, the other party may cross-examine him by taking his opinion based on another state of assumed facts, or on a hypothetical case—35 Ind. 496. Medical experts, after having given their opinions on the direct examination, may be questioned by the prisoner to test their skill and capacity, and the correctness of their conclusions—12 N. Y. 358.

Opinion of witnesses.—A witness, though not an expert, may give his opinion or impression of the mental condition of one dying from a mortal wound—43 Cal. 34; 2 Ired. 78. A witness not called as a scientific expert may testify as to the chemical effect of a powder on writing on a check similar to that by alteration of which a forgery was committed, and the check on which the effect was produced may be exhibited to the jury—47 Cal. 398.

If the prosecution introduces testimony showing that colored spots found on prisoner's clothes were blood, he is not obliged to show by scientific analysis that such spots were blood, but may rely upon the opinion of witnesses who saw the spots—49 Cal. 489. A witness may give his opinion as to the time of day when an event occurred, and the length of time which elapsed between two events—23 Ala. 44. The mere opinion of a person as to the age of a person from his appearance alone is not competent evidence—6 Conn. 9.

A witness, even though not an expert, who details a conversation had between him and another, may in connection therewith state his opinion, belief, and impression as to the state of mind of such person—43 Cal. 32. Where the remembrance of a witness is so faint that it cannot be characterized as an undoubting recollection, it is evidence—38 N. H. 324. The value of the opinion of a witness may be tested by showing that on a former occasion he had expressed a different opinion, and by inquiring as to the grounds of his change of opinion—43 Cal. 165. A witness cannot give his understanding of the meaning of declarations made to him by the prisoner unless he is an interpreter or expert—13 Fla. 636.

Where a witness testified as to hearing the sound of a carriage, he may be asked from what direction the sound seemed to come or from what point it seemed to start—46 N. H. 457. A witness may be asked whether from the prisoner's conduct and deportment, and other facts connected with them, he was to any extent under the influence of liquor—14 N. Y. 562. A witness cannot be permitted to express his opinion of defendant's guilt—14 Ala. 546; nor is it competent for defendant to show what opinion the witness expressed—110 Mass. 99. A witness who is not an expert may testify to blood stains on the clothing of the defendant at the time of his arrest—35 N. Y. 49. The correspondence between boots and footprints is a matter to which any person who has seen both may testify—103 Mass. 440. The officer of a bank may be asked whether alterations or erasures had been made in a certain paper—8 Ill. 644.

Books of science, as medical books, are not admissible in evidence, either to sustain or contradict the opinion of a witness—38 Md. 15; 117 Mass. 122; 7 R. I. 336. It is not conclusive, but is to be weighed by the jury, as other evidence—4 La. An. 376.

Rights of witnesses.—A witness may make use of a memorandum taken at the time of the facts contained therein—2 Nott. & McC. 331. A witness may refresh his recollection from a memorandum made by another person, dictated by him—17 Wis. 675. A written memorandum, signed by the witness by his mark, should first be read to him without comment—7 Gray, 585. Where the witness, after examining a memorandum made by him, stated that he could not swear from

recollection, but that the memorandum is true, his testimony is admissible—3 R. I. 132. Witness may use the plan of a house to illustrate his evidence—39 Cal. 56. It is in the discretion of the court to allow a witness to use a map to point out the location of an alleged way—107 Mass. 232.

Inspection of documents.—Opposing counsel is entitled to an inspection of papers offered in evidence to explain them or disprove their authenticity—52 Cal. 457; 41 Vt. 526.

Privilege of witness.—Where the answer to a question may furnish evidence to convict a witness, he is not bound to answer unless exempt from liability by statute—23 Gratt. 960; 2 Mo. 98; 7 Tex. 215. He must allege in substance that his answer would tend to prove him guilty of a criminal offense—24 N. Y. 74. The question whether an answer will criminate the witness will be decided by the court—2 Greene, (Iowa) 532; 2 Mo. 98; 47 N. H. 113; Thach. C. C. 146. It is not the duty of the court, independently of any objection on the part of the witness, to inform him that he is not obliged to criminate himself—4 Cush. 594. He is privileged to refuse to answer such question, unless the answer would bear directly upon the issue—19 Conn. 398; 5 Gratt. 664; 14 Mo. 112; 1 N. Y. 379; 19 Wend. 569; see 4 Id. 229. And he cannot claim the privilege when the question is necessary to understand the facts already voluntarily stated—3 Parker Cr. R. 73. Where he objects to testify, on the ground that it will criminate him, but is erroneously compelled to testify, the conviction is founded on incompetent evidence—23 Pick. 366. If a witness consents to testify so as to criminate himself and defendant, he must answer all questions legally put to him concerning the matter—10 Gray, 472; 13 Allen, 563; 97 Mass. 545; 1d. 587.

The court may in its discretion allow or disallow a question which tends to disgrace or degrade a witness—3 Minn. 246. If a witness on cross-examination is asked if he was not arrested for vagrancy, an objection that the record is the best evidence is not tenable, for an arrest does not imply that there was a record—48 Cal. 338. Section 2051 of the Code of Civil Procedure allows a cross-examiner to ask the witness if he has been convicted of a felony, and does not confine the evidence of that fact to the record of conviction—51 Cal. 600.

The testimony of either husband or wife which may tend to criminate each other, is admissible in a collateral proceeding, when it cannot afterwards be used against them—9 R. I. 361. An accomplice is privileged equally with other witnesses—47 N. H. 113. Where he discloses part of a transaction with which he was criminally concerned, without claiming his privilege, he must disclose the whole—53 Cal. 376; 30 Id. 26; 30 N. H. 540; 28 Conn. 300; 23 N. H. 348. A witness is not bound to disclose the names of the parties in his employ who gave information in the case to him—16 Me. 293. Communications from a client to his attorney touching the subject-matter are privileged—40 Cal. 284; 21 Gratt. 822. They are not admissible in evidence—40 Cal. 285; but a codefendant turning state's evidence cannot claim any privilege, including confidential communications of counsel—4 Mich. 414; 18 Id. 266; 29 Id. 173.

Impeaching witness.—A party is not allowed to contradict his own witness, by asking him whether he had not sworn differently on a former occasion—5 Denio, 112; 4 Parker Cr. R. 535; 22 N. Y. 147. Yet, where the court has good reason to apprehend that the witness is mistaken or has willfully falsified, evidence in explanation or even in contradiction will be allowed—49 Barb. 317; see 2 Met. (Ky.) 17; but a party cannot go into proof merely to discredit his witness—10 Cush. 59. The prosecuting witness may be asked whether he did not offer to compound the felony—8 Eng. 360; or whether any person on behalf of the prosecution has made him any offer of reward in relation to his tes-

timony—22 Pick. 394. The fact that a witness for the prosecution has contributed funds to carry it on, goes to his credibility—1 Denio, 524. A slight difference as to the time of an act, is not sufficient to impeach his evidence—3 Strob. 33. It is not limited to the time prior to the prosecution, but extends to the time of his examination—9 N. H. 485; proof for a year and a half previous to the trial is not too remote—97 Mass. 405; and four years previously, held admissible—32 Mich. 484. It is not an abuse of discretion to limit the defendant to eight witnesses, provided the plaintiff produces no witnesses to sustain the credibility—41 Cal. 67. The prisoner is entitled to the same right of cross-examination as if no ruling had been made in regard to the number of witnesses on the subject of impeaching testimony—53 Barb. 450.

A witness may be impeached on his statements made out of court—29 Cal. 622; 24 Ark. 620; 32 Iowa, 572; 52 Mo. 336; see 50 N. Y. 392. Before the credibility of a witness can be assailed by something he may have said elsewhere, the witness must first be inquired of concerning it, and the time, place, and person involved must be called to his attention—44 Cal. 457; 29 id. 622. He must first be given an opportunity to explain such statements—44 Cal. 452; 23 Gratt. 919; 19 Ala. 577; 14 Mo. 112; 8 La. An. 109; 62 Mo. 129; or he may show other statements corresponding with them—6 Blackf. 299. Where a witness, upon being asked whether he did not make certain statements, replies, that he has no recollection, it may be proved that he did in fact make them—6 Mo. 1; 23 Ohio St. 130. When a witness, after he has testified, declares that what he swore to was false, such declaration is evidence to impeach him—15 Wend. 419. The affidavit of a witness, sworn to before a magistrate, may be read at the trial, either to support or contradict his testimony—1 Miles, 12.

The prosecution may show by other witnesses, that the witness for defendant had given a different account of what occurred at the time, from that testified to on the stand—41 Cal. 132. Where a witness testified differently from an affidavit made by him previously, it may be shown for the purpose of discrediting him—1 Jones (N. C.) 177. The matter involved in the supposed contradiction must not be merely collateral, but must be relative to the issue—44 Cal. 458. A witness cannot be impeached by asking irrelevant questions in order to contradict his answers—44 Cal. 452; 2 McLean, 325; 53 N. Y. 164; 64 Me. 267; see 3 Ired. 346. Where collateral matters tend to show the temper, disposition, or conduct of the witness toward the parties or the subject of inquiry, collateral matter may be shown—3 Ired. 346. It is not competent to ask the witness as to his testimony at a former time, if such testimony was inadmissible—11 Ga. 615.

The testimony of a witness, taken in writing by a magistrate, may be used to show contradictory statements made by him—1 Hawks, 344; but for no other purpose—5 How. 14; 4 Pa. St. 289; 19 N. Y. 549; 4 Parker Cr. R. 396. If he is asked if he has made a certain statement in a written instrument, the writing must be produced—16 Mich. 507; 50 N. Y. 416. The testimony, as taken down and signed by witness at the coroner's inquest, may be introduced to impeach the witness, when taken as directed by statute—44 Cal. 455.

A member of the grand jury may be called to contradict him—64 Me. 267; 12 Gray, 167; 53 N. H. 484; 1 Meigs, 127; see 11 Cush. 137. So, they may testify that the person was not a witness before them—11 Cush. 137. A witness may be contradicted by a person who heard him testify on a former hearing—54 N. H. 485; and, when necessary to promote justice, a grand juror may be compelled to testify what the witnesses swore to before them—53 N. H. 484; 1 Meigs, 127.

No inference prejudicial to the veracity of witnesses can be drawn from the fact that they did not testify before the committing magistrate—26 Ala. 104. A witness cannot be impeached by proving that he has been guilty of stealing—1 McMull. 494; 5 Gratt. 664.

Where the matter was collateral, relating only to the credibility of the witness, the extent of cross-examination is in the discretion of the court—49 Cal. 33. Contradictory or confused statements of a witness, or one testifying to facts showing intimate knowledge of the facts under suspicious circumstances, authorizes the greatest latitude in cross-examination—18 Cal. 187. The fact that, after the prosecutor has left the stand, another witness testifies to certain circumstances and in his relation of them differs from the account given by the prosecutor, does not give defendant the right further to cross-examine the prosecutor—49 Cal. 636.

Permitting a cross-examiner to recall a witness to further cross-examine him, is in the discretion of the court—50 Cal. 140. It may refuse where there was already some testimony on the point—50 Cal. 140. District attorneys should avoid interposing technical objections to the admission of testimony offered by defendant, or to question further on cross-examination—52 Cal. 380; 44 Id. 452; 18 Id. 187.

Examination of witnesses.—The court has a right to control the examination of witnesses, and may refuse to allow an improper question to be asked—28 Ind. 205. So the extent of the cross-examination of a witness upon matters immaterial—34 N. Y. 223; or how far it may be pursued where the testimony has taken a wide range, is in the discretion of the court—43 Cal. 162; 39 Id. 635. The court may permit the re-examination of the witnesses as to facts not in reply or rebuttal—24 Miss. 602. It has the discretionary power to require witnesses to be examined out of the hearing of each other—18 Ala. 672; 2 Zab. 213. And where a witness disobeys an order to withdraw and fails to do so, it is in the discretion of the court to permit him to testify—20 Cal. 436; 18 Ohio, 99; 24 Miss. 602; 3 W. Va. 705.

When a witness appears adverse in interest to the party calling him, the admission of leading questions is in the discretion of the court—37 Me. 246; 64 Id. 267. An interrogatory by the judge is not a leading question—9 Allen, 271. The court has discretion to allow witnesses to be examined at any time before verdict—3 Dev. 332.

A witness may be asked on cross-examination whether he has been in jail or state prison, or any other place that would tend to impair his credibility—42 N. Y. 270; and how much of his life he has passed in such places—42 N. Y. 270. The witness may be interrogated as to any matter which may tend to show that he is biased against the party conducting the cross-examination, or that he has an interest in the result adverse to such party—52 Cal. 380; 7 Eng. 782; see 14 Gray, 31; 9 Ga. 121; 5 Denio, 106; 4 Wend. 231; or when he testifies contrary to expectation—32 Ind. 478; or that he has an interest in the prosecution adverse to the defendant—8 Mich. 117. Where a witness is asked on cross-examination when he was first questioned concerning what he had sworn to, he may be asked on re-examination if he did not previously relate the same thing to others—1 Gray, 337. If counsel for the defendant, after the prosecution has rested, asks leave to further cross-examine the prosecutor on new matters, and if the request is denied, and defendant makes the prosecutor his own witness, and it appears that it was not on new matter that he desired to cross-examine, but on matter inquired into on the former examination, defendant is not injured—49 Cal. 637.

Proof tending to prove guilt is as much to be rebutted as any—28 Cal. 423. So the defendant may show by cross-examination that the fault and the criminality, as stated by him in a part of the transaction were on the part of the witness—3 Parker Cr. R. 73. He cannot be cross-examined as to any fact which is collateral and irrelevant merely for the purpose of contradicting him, and discrediting his testimony—53 Cal. 65; 6 Parker Cr. R. 258. If such a question is asked, the answer is conclusive on the propounder—53 Cal. 65; 1d. 119; 46 Vt. 176; 1 Parker Cr. R. 387; see 1d. 154. The rule that he cannot be cross-examined as

to an irrelevant matter merely to contradict him, does not apply to matter which could be proved as an independent fact—51 Cal. 601.

Discrediting witness.—It is improper to ask a witness if he has been indicted for perjury; the indictment or certified copy thereof must be produced—47 Barb. 131. A witness cannot be asked whether he has been convicted and sentenced to the penitentiary, although he does not object—55 Barb. 186. So where he admits that he has been in the penitentiary, asking him how long he was there does not involve the question of conviction—55 Barb. 551; 42 N. Y. 270.

To prove the previous conviction of a witness, the record of conviction must be produced—39 Cal. 449; id. 614; id. 697; 35 id. 96; but the denial of a motion for delay to obtain such record is not ground of exception—48 Me. 327.

Where the record of conviction is offered in evidence to discredit a witness, it is not ground for its rejection that the transaction occurred twenty-five years before—12 N. Y. 356; 1 Parker Cr. R. 495. The record of conviction of one standing in the relation of principal is not evidence against one charged with him as accessory—10 Cal. 68. To prove the record of conviction in another State, the seal of the court must be affixed with the certificate of the clerk—9 Wis. 140; see 115 Mass. 146; S. C. 2 Green C. R. 285. Witnesses may be examined to show that words were improperly struck out of the record, but they cannot falsify the record—33 Ill. 276. The record of conviction as a common prostitute, is not admissible to impeach the witness—24 Conn. 363. In Maine the record of conviction need not be for an infamous crime—63 Me. 128. No credit is to be given to the testimony of a witness who has been convicted of felony and pardoned, unless corroborated—2 Wheel. C. C. 451. A pardon which does not extend to the offense but simply to the offender, does not give one the right to be believed under oath—43 Cal. 439.

A witness cannot be discredited by proof of particular acts not directly involved in the issue—29 Mich. 173; 19 N. Y. 549; but he may be discredited by showing his bad moral character—13 Mo. 236; 14 Ind. 348. He may be shown to have been drunk at the time of the transaction—5 Humph. 564. A witness may refuse to answer whether he had pleaded guilty to a crime—48 Ga. 116; and proof of another offense is not admissible—see 35 Ind. 460; 53 N. Y. 164.

The correct interpretation of subd. 3 of § 2061 of the Code of Civil Procedure is, that a witness willfully false in one part is to be distrusted in others—53 Cal. 354; id. 491; 30 id. 151-6. The rule applies only where the false testimony is given willfully, and not where it was given innocently or by mistake—30 Cal. 151.

It is not an inflexible rule that when a witness has sworn falsely his testimony is to be disregarded, except in those particulars in which it is corroborated—97 Mass. 405; 2 Jones, (N. C.) 257; 8 id. 132; 63 N. C. 518; but see 3 Head. 243; 15 Ohio St. 47; 15 Mich. 408. An affirmative witness of equal credibility and knowledge, is to be believed in preference to many negative witnesses—14 Ga. 55; see 1 id. 213. So, when a trustworthy witness swears positively that defendant did not strike the blow, it is not negative evidence—18 Ill. 266. The jury are to judge of the credibility of the witness—19 Cal. 603; 16 id. 110; 55 Barb. 450; 47 Ga. 297; 12 Vt. 93.

Impeachment of character of witness.—When a defendant testifies in his own behalf, he puts his general character and credibility in issue, and may be impeached the same as any other witness—58 Barb. 51. The party impeaching a witness should ask the impeaching witness whether he has the means of knowing the general character of the witness—4 Ired. 88. The inquiry into the character of a witness, to impeach his testimony, is confined to his reputation for truth and veracity, and not to his moral standing—27 Cal. 630. In some jurisdic-

tious it may extend to his general moral character—10 Ired. 469; 55 Mo. 520; 58 Id. 507. Particular acts of misconduct on the part of the witness cannot be shown by way of impeachment—50 Cal. 234.

The proper inquiry is what is his general character in the place where he resides, from witness' knowledge?—2 McLean, 219; 30 Me. 71; 20 Ohio, 18; 6 Gratt. 706; and whether he would believe him on oath—4 Wend. 231; 29 Mich. 173; 32 Id. 484; see 9 N. H. 485. It is not competent to base his belief on personal knowledge as distinguished from general reputation—53 Cal. 68. He should first state that he is acquainted with that person's general character in the particular to which he deposes—25 Ala. 53. It is not competent to prove his general bad character disconnected from veracity—2 McLean, 219; 30 Me. 71; 20 Ohio, 18; 6 Gratt. 706.

In Ohio, the inquiry is restricted to the general character of the witness for truth and veracity—5 Ohio, (N. S.) 605. In Tennessee, the inquiry involves the whole moral character of the witness—1 Head, 38. The credit of a witness may be impeached, although the impeaching witnesses do not testify that from his general reputation they would not believe him under oath—35 Cal. 563. If the general character of a witness is impeached, the jury are bound to disregard the whole of his testimony—16 Ohio St. 218.

Sustaining character of witness.—Any inquiries into the character of a witness opens that subject to evidence to sustain his good character—7 Gray, 46; 13 Tex. 713. Where the circumstances are calculated to excite doubts as to the truth of the charge, and to create an unfavorable impression as to the principal witness, the prosecutor may show any circumstance which will tend to rebut these presumptions—1 N. Y. 379. As a general rule, it is not competent for the party to prove that the witness has made declarations out of court corresponding with his testimony, but this rule has its exceptions—see 1 Parker Cr. R. 147; 10 Ired. 419; 10 Gray, 485; 24 Iowa, 570.

A person called to sustain the character of a witness may testify that he would believe him under oath—21 Wend. 309; and that he has never heard his character called in question—4 W. Va. 755; S. C. 1 Green C. R. 667; but a person is not competent to testify as to his general character simply because he has known him for years—69 N. C. 72; S. C. 1 Green C. R. 363. When it is proved that a witness has been convicted of felony, evidence is admissible to show that his reputation for truth and integrity is good in the community where he lives—50 Cal. 233; see 8 Conn. 93; 2 Hill, 317. A party cannot prove the general good character of his own witness until it has been attacked—5 Denio, 106; but if his character is impeached, the party calling him may introduce testimony in support of his character for truth and veracity—19 Wend. 569; 33 Ind. 418.

The credit of a witness cannot be sustained by proof that he made to other persons before being called as a witness the same statements detailed in his testimony, except to prove they were not a fabrication of late date—48 Cal. 90. The imputed hostility of a witness may be negatived by asking him whether he feels so unfriendly towards the prisoner as to wish to see an innocent man convicted—23 Ala. 44; see 1 N. Y. 379. If evidence is introduced tending to show that one of the prosecutor's witnesses was suborned, the prosecution may introduce evidence to establish the good character of the witness—48 Cal. 64.

Proof of conviction for felony is an assault on the character of the witness for integrity and truth, and the prosecution may, in rebuttal, examine witnesses to prove that his reputation for truth and integrity is good in the community where he resides—50 Cal. 233. Where upon cross-examination an affidavit made by the witness was offered to impeach his testimony, the circumstances and conversation had by the witness with the person at whose instance the affidavit was made are

admissible—55 Cal. 185. A record of conviction for an assault by a witness is admissible against him, to impeach his credibility, for denying the commission of a prior assault—110 Mass. 410. Showing the original record of a coroner's jury to a witness, and asking him if he had signed the verdict, is not "an effort to prove the contents of a written record by parole"—43 Cal. 164.

1322. Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties. [Approved March 30th, in effect July 1st, 1874.]

When a wife, by statute, is permitted to testify for her husband, she is entitled to have her credibility tested by the same rules that apply to other witnesses—6 Iowa, 263; 8 id. 355; see 10 id. 81. Where a witness is called, and objected to by the opposite party on the ground that she is the wife of the party objecting, and he then proves by other witnesses that the two had cohabited together for a long time as husband and wife, had passed in society as such, and had represented each other as husband and wife, and there is no testimony to the contrary, she should be rejected as a witness—26 Cal. 133; 10 id. 535; 17 id. 598; 9 Paige, 611; 8 Serg. & R. 158.

A woman living with defendant as his wife, but not married to him, is a competent witness against him—35 Cal. 230; 9 La. An. 308. The wife of the prisoner is not a competent witness against her husband—49 N. Y. 625; but in a proceeding against her husband, she is a competent witness—43 Mo. 429; but see Busb. 123. Where it is proper to allow an accomplice to be sworn, a man's wife is a competent witness 6 Parker Cr. R. 119; 25 Iowa, 128; 5 Blatchf. 102. A wife, as codefendant, is not a competent witness for the others—1 Gray, 555; see 9 Rich. 168; but if a default is entered against one, his wife is a competent witness for the others—31 Me. 62. The fact that the husband is a party to the record does not, of itself, exclude the wife as a witness on behalf of other parties—1 Met. 13. She cannot testify if the effect of her testimony is to injure or benefit her husband, but otherwise when her husband can derive no benefit nor receive any detriment—1 Nev. 543. On the trial for conspiracy to charge the wife of one of the defendants with adultery, such wife is not a competent witness—15 Me. 104; 37 Mo. 343; 51 id. 27.

If married women testify for the prosecution, defendant cannot, for the purpose of affecting their credibility, introduce testimony to prove a conspiracy on the part of their husbands to falsely prosecute him—49 Cal. 637. Where an accomplice and his wife are witnesses in determining the credibility of the testimony of the husband, the jury may take into consideration that of the wife—16 N. Y. 444.

1323. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or proceeding. [Approved March 30th, in effect July 1st, 1874.]

Defendant as witness.—A defendant has a right to testify on his own behalf—42 Cal. 168. The defendant need not testify in his own behalf, and no inference of guilt can be drawn from his failure to do so—36 Cal. 522; and counsel cannot so argue against defendant's objections—53 id. 66; see 36 id. 522. The fact that defendant offers himself as a witness does not change or modify the rules of practice with reference to the proper limits of cross-examination, and does not make him a witness for the State against himself—41 Cal. 431. A question put to him on cross-examination, as to whether he had not been previously arrested for another larceny, is not objectionable—45 Cal. 148. If he testifies on his own behalf, the court need not, of its own motion, charge as to his credibility—44 Cal. 540. The same rule applies as to other witnesses—44 Cal. 540. See Const. Prov. *ante*, p. 18.

Examination of defendant as witness.—A defendant may be a witness in his own behalf—31 Cal. 576; see *ante*, page 18. It is not a valid objection to a witness that his name is not entered on the indictment—19 Cal. 426; 22 id. 348; 23 id. 562; 31 id. 576; but it may be a ground for a continuance—6 id. 96. He is entitled to the same rights and is subject to the same rules as any other witness—49 Ind. 124; 65 Barb. 48. The degree of credit to which he was entitled is for the jury and not the court—63 Barb. 630. The failure of a defendant to become a witness on his own behalf, is not to be considered by the jury as a circumstance tending to establish guilt, and counsel must not so argue against objections of defendant's counsel—53 Cal. 67; 36 id. 522.

In the United States courts the prisoner cannot testify in his own behalf—1 Dill. 422. A party as witness drops the character of a party and assumes that of a witness and is entitled to the privileges of a witness—24 N. Y. 298. Defendant as a witness on his own behalf may be cross-questioned by asking if he omitted anything pertinent to the case, and his attention may be directed to the precise point by asking him if some specified thing did not occur—46 Cal. 124; 65 Barb. 48. Where a defendant offers himself for examination in his own behalf, the prosecution cannot make him their witness by cross-examination—41 Cal. 429; 9 Nev. 179. The credit to be given to the defendant as a witness, is to be left to the jury—44 Cal. 540. See *ante*, § 1102, note.

CHAPTER III.

COMPELLING THE ATTENDANCE OF WITNESSES.

- § 1326. Subpoena defined, and who may issue.
- § 1327. Form of subpoena.
- § 1328. Subpoena, by whom and how served.
- § 1329. Expenses of witness from without the county, or poor.
- § 1330. Attendance of witness residing or served out of the county.
- § 1331. Disobedience to subpoena, etc.
- § 1332. Failure to appear, undertaking forfeited.
- § 1333. Temporary removal of imprisoned witnesses.

1326. The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by—

1. A magistrate before whom a complaint is laid, for witnesses in the State, either on behalf of the people or of the defendant.

2. The district attorney, for witnesses in the State, in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct.

3. The district attorney, for witnesses in the State, in support of an indictment or information, to appear before the court in which it is to be tried.

4. The clerk of the court in which an indictment or information is to be tried; and he must, at any time, upon application of the defendant, and without charge, issue as many blank subpoenas, subscribed by him as clerk, for witnesses in the State, as the defendant may require.

[In effect April 9th, 1880.]

Witness, procuring attendance.—The issuing of an attachment against a witness on behalf of the prisoner, after arrangements for summing up the case, is in the discretion of the court—19 N. Y. 549. It is a crime at common law to induce a witness to absent himself, and an attempt to do so, though not accomplished, will subject the offender to indictment—64 Me. 386. On an indictment for getting a witness out of the way, it need not be proved that the testimony of the witness was material—3 Har. (Del.) 562.

1327. A subpoena authorized by the last section must be substantially in the following form:

"The people of the State of California to A. B.:

"You are commanded to appear before C. D., a justice of the peace of — township, in — county, (or as the case may be) at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the people of the State of California against E. F.

"Given under my hand this — day of —, A. D. eighteen —. G. H., justice of the peace," (or "J. K., district attorney," or "By order of the court, L. M., clerk," or as the case may be). If books, papers, or documents are required, a direction to the following effect must be contained in the subpoena: "And you are required, also, to bring with you the following" (describing intelligibly the books, papers, or documents required).

1328. A subpoena may be served by any person, but a peace officer must serve in his county any subpoena delivered to him for service, either on the part of the people or of the defendant, and must, without delay, make a written return of the service, subscribed by him, stating the time and place of service. The service is made by showing the original to the witness personally, and informing him of its contents.

1329. When a person attends before a magistrate, grand jury, or court, as a witness in a criminal case, upon a subpoena or in pursuance of an undertaking, and it appears that he has come from a place outside of the county, or that he is poor and unable to pay the expenses of such attendance, the court, at its discretion, if the attendance of the witness be upon a trial, by an order upon its minutes, or, in any other case, the judge, at his discretion, by a written order, may direct the county auditor to draw his warrant upon the county treasurer in favor of witness for a reasonable sum, to be specified in the order, for the necessary expenses of the witness. [Approved March 8th, 1876.]

1330. No person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides, or is served with the subpoena, unless the judge of the court in which the offense is triable, or a justice of the Supreme Court, or a judge of a Superior Court, upon an affidavit of the district attorney or prosecutor, or of the defendant, or his counsel, stating that he believes the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness. [In effect April 12th, 1880.]

1331. Disobedience to a subpoena, or a refusal to be sworn or to testify as a witness, may be punished by the court or magistrate as a contempt. A witness disobeying a subpoena issued on the part of the defendant, unless he show good cause for his non-attendance, is liable to the defendant in the sum of one hundred dollars, which may be recovered in a civil action.

Contempt.—The refusal of a witness to testify, or to answer a proper question, is a contempt—1 Ind. 161.

1332. When a witness has entered into an undertaking to appear, upon his failure to do so the undertaking is forfeited in the same manner as undertakings of bail.

1333. When the testimony of a material witness for the people is required in a criminal action, before a court of record of this State, and such witness is a prisoner in the State prison, or in a county jail, an order for his temporary removal from such prison or jail, and for his production before such court, may be made by the court in which the action is pending, or by the judge thereof; but in case the prison or jail is out of the county in which the application is made, such order shall only be made upon the affidavit of the district attorney, or other person, on behalf of the people, showing that the testimony is material and necessary; and even then the granting of the order shall be in the discretion of the court or judge. The order shall be executed by the sheriff of the county

in which it shall be made, whose duty it shall be to bring the prisoner before the proper court, to safely keep him, and when he is no longer required as a witness, to return him to the prison or jail whence he was taken; the expense of executing such order shall be paid by the county in which the order shall be made. [In effect April 1st, 1878.]

CHAPTER IV.

EXAMINATION OF WITNESSES CONDITIONALLY.

- § 1335. Witnesses examined conditionally for the defendant.
- § 1336. In what cases defendant may apply for the order.
- § 1337. Application, how made.
- § 1338. Application, to whom made.
- § 1339. Order, when granted and what to contain.
- § 1340. Examination in absence of district attorney.
- § 1341. If facts disproved, examination not to proceed.
- § 1342. Attendance of witness, how enforced.
- § 1343. Testimony, how taken and authenticated.
- § 1344. Deposition to be transmitted to clerk.
- § 1345. When may be read in evidence. Objections, etc.
- § 1346. Deposition of witness imprisoned in another county.

1335. When a defendant has been held to answer a charge for a public offense, he may, either before or after an indictment or information, have witnesses examined conditionally, on his behalf, as prescribed in this chapter, and not otherwise. [In effect April 9th, 1880.]

1336. When a material witness for the defendant is about to leave the State, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

1337. The application must be made upon affidavit, stating—

1. The nature of the offense charged.
2. The state of the proceedings in the action.
3. The name and residence of the witness, and that his testimony is material to the defense of the action.
4. That the witness is about to leave the State, or is so sick or infirm as to afford reasonable grounds for apprehending that he will not be able to attend the trial.

1338. The application may be made to the court, or to a judge thereof, and must be made upon three days' notice to the district attorney. [In effect March 12th, 1880.]

1339. If the court or judge is satisfied that the examination of the witness is necessary, an order must be made that the witness be examined conditionally, at a specified time and place, and that a copy of the order be served on the district attorney, within a specified time before that fixed for the examination.

1340. The order must direct that the examination be taken before a magistrate named therein, and on proof being furnished to such magistrate of service upon the district attorney of a copy of the order, if no counsel appear on the part of the people, the examination must proceed.

1341. If the district attorney or other counsel appear on behalf of the people, and it is shown to the satisfaction of the magistrate, by affidavit or other proof, or on the examination of the witness, that he is not about to leave the State, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place; otherwise it must proceed.

1342. The attendance of the witness may be enforced by a subpoena, issued by the magistrate before whom the examination is to be taken.

1343. The testimony given by the witness must be reduced to writing, and authenticated in the same manner as the testimony of a witness taken in support of an information.

1344. The deposition taken must, by the magistrate, be sealed up and transmitted to the clerk of the court in which the action is pending or may come for trial.

1345. The deposition or a certified copy thereof, may be read in evidence by either party on the trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his con-

tinued absence from the State. Upon reading the deposition in evidence, the same objections may be taken to a question or answer contained therein as if the witness had been examined orally in court.

The proper practice is to take the testimony of the witnesses in writing, and return it to the District Court as required by statute—44 Cal. 459.

Depositions in evidence.—Depositions are admissible in evidence—44 Cal. 452. The deposition of a witness, given before the coroner's jury and certified and returned by the coroner as required by statute, is admissible for the purpose of contradicting the statement of the witness made under oath—44 Cal. 459. It must set forth the actual compliance with all the requirements of the statute—6 Cal. 559. If a magistrate, in taking a deposition, erroneously excludes a question asked of a witness, the error does no injury if the question asked was immaterial—50 Cal. 139.

Depositions taken under section 869 are not admissible against defendant under section 686 unless taken in the manner and form, and certified as required by section 869. If certified by a mere jurat, is not admissible—54 Cal. 575. Depositions cannot, in general, be used against the prisoner, nor in his favor, unless by his consent—7 Smedes & M. 475. Depositions taken before commitment, or otherwise than as specially provided by the Code, cannot be used against the defendant—6 Cal. 203.

1346. When a material witness for a defendant, under a criminal charge, is a prisoner in the State prison, or in the county jail of a county other than that in which the defendant is to be tried, his deposition may be taken, on behalf of the defendant, in the manner provided for in the case of a witness who is sick, and the provisions of the Penal Code, commencing with section thirteen hundred and thirty-five, and ending with section thirteen hundred and forty-five, shall, so far as applicable, govern in the application for and in the taking and use of such deposition. Such deposition may be taken before any magistrate or notary public of the county in which the jail or prison is situated; or in case the witness is confined in the State prison, and the defendant is unable to pay for taking the deposition, before the warden or clerk of the board of directors of the State prison, whose duty it shall be to act without compensation. Every officer, before whom testimony shall be taken by virtue hereof, shall have authority to administer, and shall administer, an oath to the witness that his testimony shall be the truth, the whole truth, and nothing but the truth. [In effect April 9th, 1880.]

CHAPTER V.

EXAMINATION OF WITNESSES ON COMMISSION.

- § 1349. Examination of witness residing out of the State.
- § 1350. When defendant may apply for an order to examine.
- § 1351. Commission defined.
- § 1352. Application made on affidavit.
- § 1353. Application, to whom made.
- § 1354. Order for commission, when granted, stay of proceedings.
- § 1355. Interrogations, how settled and allowed.
- § 1356. Direction as to the return of the commission.
- § 1357. Commission, how executed.
- § 1358. Returned commission, delivered to an agent.
- § 1359. Same.
- § 1360. When and how filed.
- § 1361. Commission and return, open for inspection. Copies, etc.
- § 1362. Depositions to be read in evidence. Objections.

1349. When an issue of fact is joined upon an indictment or information, the defendant may have any material witness, residing out of the State, examined in his behalf, as prescribed in this chapter, and not otherwise. [In effect April 9th, 1880.]

1350. When a material witness for the defendant resides out of the State, the defendant may apply for an order that the witness be examined on a commission.

1351. A commission is a process issued under the seal of the court and the signature of the clerk, directed to some person designated as commissioner, authorizing him to examine the witness upon oath or interrogatories annexed thereto, to take and certify the deposition of the witness, and to return it according to the directions given with the commission.

1352. The application must be made upon affidavit, stating:

1. The nature of the offense charged.

2. The state of the proceedings in the action, and that an issue of fact has been joined therein.

3. The name of the witness, and that his testimony is material to the defense of the action.

4. That the witness resides out of the State.

1353. The application may be made to the court, or a judge thereof, and must be upon 'three days' notice to the district attorney. [In effect March 12th, 1880.]

1354. If the court to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony; and the court may insert in the order a direction that the trial be stayed for a specified time, reasonably sufficient for the execution and return of the commission. [In effect April 9th, 1880.]

1355. When the commission is ordered, the defendant must serve upon the district attorney, without delay a copy of the interrogatories to be annexed thereto, with two days' notice of the time at which they will be presented to the court or judge. The district attorney may in like manner serve upon the defendant or his counsel cross-interrogatories, to be annexed to the commission, with the like notice. In the interrogatories either party may insert any questions pertinent to the issue. When the interrogatories and cross-interrogatories are presented to the court or judge, according to the notice given, the court or judge must modify the questions so as to conform them to the rules of evidence, and must indorse upon them his allowance and annex them to the commission.

1356. Unless the parties otherwise consent, by an indorsement upon the commission, the court or judge must indorse thereon a direction as to the manner in which it must be returned, and may in his discretion, direct that it be returned by mail or otherwise, addressed to the

clerk of the court in which the action is pending, designating his name and the place where his office is kept.

1357. The commissioner, unless otherwise specially directed, may execute the commission as follows:

1. He must publicly administer an oath to the witness that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth.

2. He must cause the examination of the witness to be reduced to writing, and subscribed by him.

3. He must write the answers of the witness as near as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it until it conforms to what he declares is the truth.

4. If the witness decline answering a question, that fact, with the reason assigned by him for declining, must be stated.

5. If any papers or documents are produced before him and proved by the witness, they, or copies of them, must be annexed to the deposition subscribed by the witness and certified by the commissioner.

6. The commissioner must subscribe his name to each sheet of the deposition, and annex the deposition, with the papers and documents proved by the witness, or copies thereof, to the commission, and must close it up under seal, and address it as directed by the indorsement thereon.

7. If there be a direction on the commission to return it by mail, the commissioner must immediately deposit it in the nearest post-office. If any other direction be made by the written consent of the parties, or by the court or judge, on the commission, as to its return, the commissioner must comply with the direction.

A copy of this section must be annexed to the commission. [Approved March 30th, in effect July 1st, 1874.]

1358. If the commission and return be delivered by the commissioner to an agent, he must deliver the same

to the clerk to whom it is directed, or to the judge of the court in which the action is pending, by whom it may be received and opened, upon the agent making affidavit that he received it from the hands of the commissioner, and that it has not been opened or altered since he received it. [In effect April 9th, 1880.]

1359. If the agent is dead, or from sickness or other casualty unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent; that the agent is dead, or from sickness or other casualty unable to deliver it; that it has not been opened or altered since the person making the affidavit received it; and that he believes it has not been opened or altered since it came from the hands of the commissioner.

1360. The clerk or judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment is pending. If the commission and return is transmitted by mail, the clerk to whom it is addressed must receive it from the post-office, and open and file it in his office, where it must remain, unless otherwise directed by the court or judge.

1361. The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same or of any part thereof, on payment of his fees.

1362. The depositions taken under the commission may be read in evidence by either party on the trial, upon it being shown that the witness is unable to attend from any cause whatever; and the same objections may be taken to a question in the interrogatories or to an answer in the deposition, as if the witness had been examined orally in court.

The court may exercise discretion in admitting or rejecting a deposition taken out of the State—50 Me. 409; see 38 Cal. 183; *ante*, § 1345.

CHAPTER VI.

INQUIRY INTO THE INSANITY OF THE DEFENDANT BEFORE TRIAL OR AFTER CONVICTION.

- § 1367. Insane person cannot be tried, or punished.
- § 1368. Doubts as to sanity of the defendant, how determined. Stay of proceedings on.
- § 1369. Trial of the question of insanity. Charge of the court.
- § 1370. Verdict of the jury as to sanity, and proceedings thereon.
- § 1371. If defendant is committed, it exonerates his bail, etc.
- § 1372. Defendant detained in asylum until he becomes sane.
- § 1373. Expense of sending, etc., defendant to asylum.

1367. A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane.

Insanity.—A person cannot be tried, adjudged, or punished while insane, for a public offense—31 Cal. 579. The criminal actor must be of sane mind, as an act does not make a man guilty unless his mind is guilty—see Co. Litt. 247 b; 1 Russ. Cr. 9th ed. 6; 1 Hale P. C. 434; 1 Bish. C. L. 6th ed. § 375; and an insane person cannot have any intent—38 Ga. 507. Sanity is an essential ingredient in crime; but mere weakness of mind is not insanity—8 Cal. 370; 24 Ind. 231; 7 Ga. 3; see 40 Ill. 358; 58 Ind. 538. Insanity is a disease which impairs or totally destroys either the understanding, or the will, or both—31 Ind. 492; a controlling disease which cannot be resisted—1 Duval, 224; 54 Barb. 274; 3 Ga. 329; 31 Ind. 492; id. 485; 7 Met. 509; 59 Pa. St. 328; 65 id. 347; see 4 Met. (Ky.) 227; sufficient to create an overwhelming impulse to do the act—8 Bush, 365; id. 464; 49 Conn. 136; 47 Ga. 553; 31 Ill. 385; id. 485; 25 Iowa, 67; 2 Parker Cr. R. 43; 4 Pa. St. 267; see 7 Law Reporter, 361. A person may be insane in a degree not relieving from responsibility for crime—39 Cal. 690; 1 Cliff. 98; 39 Conn. 591; 13 Abb. Pr. N. S. 207; Edm. Sel. Cas. 126; 1 Curt. 1; 31 Ill. 285; 10 Minn. 223; 57 Me. 574; 50 N. H. 369; 4 Pa. St. 264; 1 Strob. 479. Moral insanity coexisting with mental insanity has no foundation in law, and will not furnish an excuse from punishment for crime—47 Cal. 134; 24 id. 239; 1 Cliff. 98; 39 Conn. 591; 4 Denio, 9; 25 Ga. 507; 45 id. 190; 31 id. 424; 11 Gray, 303; 8 Abb. Pr. N. S. 57; 5 Har. (Del.) 512; 8 Jones (N. C.) 463; 6 McLean, 121; 57 Me. 574; 2 N. Y. 193; 52 id. 467; 2 Ohio St. 54; 48 Mass. 500; Wright, 392; 2 Va. Cas. 132; 1 Zab. 196. Insanity produced by intoxication does not destroy responsibility, if the accused when sane voluntarily made himself drunk—43 Cal. 352; 36 id. 531. See Desty's Crim. Law, §§ 23-30; see *ante*, § 1016.

Test of insanity.—The true inquiry is, whether the defendant was capable of having and did have a criminal intent, and the capacity to distinguish between right and wrong, as to the act charged as a crime—47 Cal. 134; 24 id. 239; 17 Ala. 434; 1 Curt. 1; 3 Heisk. 348; 31 Ill. 388; 30 Miss. 600; 21 Mo. 464; 32 N. Y. 719; 52 id. 467; 10 Ohio St. 598; 23 id. 146; 76 Pa. St. 414; 7 Tex. Ct. App. 163; id. 607; see 34 Iowa, 131; and it is sufficient if shown to have existed in reference to the particular act

-47 Cal. 134; 24 id. 230; 40 Conn. 136; 1 Curt. 8; 39 Conn. 591; 4 Denio, 29; 3 Ga. 310; 31 id. 424; 42 id. 9; 45 id. 58; id. 190; id. 280; 4 Greene, Iowa, 500; 6 McLean, 121; 7 Met. 500; 57 Me. 574; 11 Gray, 303; 5 N. H. 369; 2 Barb. 566; 52 N. Y. 467; 4 Pa. St. 264; 78 id. 122; 2 Parker Cr. R. 43; 1 Baxt. 178; 1 Zab. 196; Wright, 392; 2 Va. Cas. 132. See Desty's Crim. Law, § 23 b.

1368. When an action is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on conviction, if a doubt arise as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the court, during the pendency of the issue of insanity. [In effect April 9th, 1880.]

Proof of insanity.—As often as any doubt of the sanity of the defendant arises the same proceedings may be had—31 Cal. 579; 15 id. 329. Counsel cannot waive an inquiry as to the question of the sanity of defendant, nor can he compel the court to enter upon the inquiry where no ground for doubt arises—42 Cal. 21. No plea of present insanity is required if during the proceedings a doubt arises. It is then the duty of the court of its own motion to suspend further prosecution until the question of sanity has been determined—42 Cal. 21. The burden of proof is on the prisoner—49 Cal. 488; 47 id. 136; 20 id. 519.

Insanity must be proved as a substantive fact by the party alleging it—20 Cal. 518; 4 Cranch C. C. 514; 1 Curt. 1; 7 Gray, 583; 1 Zab. 202; 8 Jones, (N. C.) 463; 1 Strob. 479; 5 Ala. 241; 20 Gratt. 860; 10 Ohio St. 598; and must be clearly established by satisfactory evidence—47 Cal. 136. The jury are to be governed by the preponderance of evidence, and are not to require it to be made out beyond a reasonable doubt—24 Cal. 230; 49 id. 14; id. 488; 6 id. 410; 5 id. 129; 20 id. 519; 7 Gray, 583; 7 Met. 500; 10 Ohio St. 598; 57 Me. 574; 11 Gray, 303; 16 N. Y. 58; 35 id. 125; 42 id. 147; 77 Pa. St. 205; 76 id. 414; 26 Ark. 334; 32 Iowa, 49; 6 Jones, (N. C.) 365; 8 id. 463; 10 Ohio St. 598; 31 id. 111; see 1 Brewst. 356; 83 Pa. St. 131; 84 id. 200.

It is not improper to caution the jury to be careful that no pretended case of insanity should be allowed to shield the defendant from the ordinary consequences of his act—45 Cal. 652.

1369. The trial of the question of insanity must proceed in the following order:

1. The counsel for the defendant must open the case, and offer evidence in support of the allegation of insanity.

2. The counsel for the people may then open their case, and offer evidence in support thereof.

3. The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in fur-

therance of justice, permit them to offer evidence upon their original cause.

4. When the evidence is concluded, unless the case is submitted to the jury on either or both sides without argument, the counsel for the people must commence, and the defendant or his counsel may conclude the argument to the jury.

5. If the indictment be for an offense punishable with death, two counsel on each side may argue the cause to the jury, in which case they must do so alternately. In other cases, the argument may be restricted to one counsel on each side.

6. The court must then charge the jury, stating to them all matters of law necessary for their information in giving their verdict.

1370. If the jury find the defendant sane, the trial must proceed, or judgment be pronounced, as the case may be. If the jury find the defendant insane, the trial or judgment must be suspended until he becomes sane, and the court must order that he be in the meantime committed by the sheriff to the State insane asylum, and that upon his becoming sane he be redelivered to the sheriff. [In effect April 9th, 1880.]

1371. The commitment of the defendant, as mentioned in the last section, exonerates his bail, or entitles a person, authorized to receive the property of the defendant, to a return of any money he may have deposited instead of bail.

1372. If the defendant is received into the asylum, he must be detained there until he becomes sane. When he becomes sane, the superintendent must give notice of that fact to the sheriff and district attorney of the county. The sheriff must thereupon, without delay, bring the defendant from the asylum, and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged.

1373. The expenses of sending the defendant to the asylum, of keeping him there, and of bringing him back, are in the first instance chargeable to the county in which the indictment was found, or information filed; but the county may recover them from the estate of the defendant, if he have any, or from a relative, town, city, or county bound to provide for and maintain him elsewhere. [In effect April 9th, 1880.]

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CHAPTER VII.

COMPROMISING CERTAIN PUBLIC OFFENSES BY LEAVE OF THE COURT.

- § 1377. Compromise of offenses for which civil action may be had.
- § 1378. Compromise by permission of the court bars another prosecution.
- § 1379. No public offense to be compromised except.

1377. When a defendant is held to answer on a charge of misdemeanor, for which the person injured by the act constituting the offense has a remedy by civil action, the offense may be compromised as provided in the next section, except when it is committed:

1. By or upon an officer of justice, while in the execution of the duties of his office.
2. Riotously.
3. With an intent to commit a felony.

Where an offense is a personal tort, and there is no attempt to suppress the prosecution, it may be compromised—50 Ga. 156. The bare taking of one's goods back again or receiving reparation is no offense—5 N. H. 553. Where money is paid for the purpose of reimbursing for expenses, as, for search of stolen property—16 Ill. 94; 51 Id. 234; or, for the purpose of settling the matter, there being no prosecution set on foot, and no agreement not to prosecute, is not compounding the offense—9 Wis. 478.

1378. If the party injured appears before the court to which the depositions are required to be returned, at any time before trial, and acknowledges that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom; but in such case the reasons for the order must be set forth therein, and entered on the minutes. The order is a bar to another prosecution for the same offense.

The consent of the court cannot make an agreement to abandon a prosecution valid, if it would be otherwise unlawful—6 Q. B. 306; 8 C. 2 Lead. C. C. 216.

1379. No public offense can be compromised, nor can any proceeding or prosecution for the punishment thereof upon a compromise be stayed, except as provided in this chapter.

There can be no compromise of a criminal charge where the party is arrested, or in any way held to answer—6 Oreg. 308; and neither an officer or a witness possesses the power to compromise a felony—1 Wyo. 277. An offense which, in the discretion of the court, may be punished by imprisonment in the penitentiary, cannot be compromised—39 Ga. 85. See Desty's Crim. Law, §§ 10, 74 d.

CHAPTER VIII.

DISMISSAL OF THE ACTION BEFORE OR AFTER INDICTMENT, FOR WANT OF PROSECUTION OR OTHERWISE.

- § 1382. When action may be dismissed.
- § 1383. Continuance and discharge from custody.
- § 1384. If action dismissed, defendant to be discharged, etc.
- § 1385. Dismissal on motion of court or application of district attorney.
- § 1386. *Nolle prosequi* abolished.
- § 1387. Dismissal a bar in misdemeanor, but not in felony.

1382. The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases:

1. Where a person has been held to answer for a public offense, if an indictment is not found or an information filed against him, within thirty days thereafter.

2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information. [In effect April 9th, 1880.]

Dismissal.—The dismissal is in the nature of a nonsuit—54 Cal. 412. Upon such dismissal the power of the court to resubmit ceases—54 Cal. 413, explaining 52 id. 463. An application for dismissal must be made, in the first place, to the court where the prosecution is pending—54 Cal. 101. When the grand jury has dismissed a charge, the court may dismiss the action and discharge defendant from custody, and discharge the sureties from the bond, unless it has reason to believe the grand jury, at a succeeding term, may properly indict him—54 Cal. 413. See *ante*, § 941.

1383. If the defendant is not charged or tried, as provided in the last section, and sufficient reason therefor is shown, the court may order the action to be continued from time to time, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued. [In effect April 9th, 1880.]

See 54 Cal. 413; *ante*, § 942.

1384. If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him. See 54 Cal. 414.

1385. The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes.

Dismissal of action.—The discharge must be at the trial, before the defendant has gone into his defense, and by the court, of its own motion, or on application of the district attorney—48 Cal. 253. Defendant cannot be discharged from the indictment without trial, except in the cases provided by statute—48 Cal. 253.

1386. The entry of a *nolle prosequi* is abolished, and neither the attorney-general nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section.

1387. An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor; but it is not a bar if the offense is a felony.

Dismissal a bar.—The dismissal is a bar in misdemeanors, but not in felonies. He may be again examined before a magistrate, and held for the same offense—52 Cal. 464; 54 Id. 412. See *ante*, JEOPARDY, p. 17.

CHAPTER IX.

PROCEEDINGS AGAINST CORPORATIONS.

- § 1390. Summons upon information against corporation.
- § 1391. Form of summons.
- § 1392. When and how served.
- § 1393. Examination of the charge.
- § 1394. Certificate of magistrate and return of depositions.
- § 1395. Grand jury to investigate if there is sufficient cause
- § 1396. Appearance and plea.
- § 1397. Fine on conviction, how collected.

1390. Upon an information or presentment against a corporation, the magistrate must issue a summons signed by him, with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge, the time to be not less than ten days after the issuing of the summons.

1391. The summons must be substantially in the following form:

"COUNTY OF (as the case may be).

"*The People of the State of California to the* (naming the corporation):

"You are hereby summoned to appear before me at (naming the place), on (specifying the day and hour), to answer a charge made against you upon the information of A. B. (or the presentment of the grand jury of the county, as the case may be), for (designating the offense generally).

"Dated at the city (or township) of —, this — day of —, eighteen —.

"G. H., Justice of the Peace" (or as the case may be).

1392. The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the president

or other head of the corporation, or to the secretary, cashier, or managing agent thereof.

1393. At the appointed time in the summons, the magistrate must proceed to investigate the charge in the same manner as in the case of a natural person, so far as these proceedings are applicable.

1394. After hearing the proofs, the magistrate must certify upon the depositions, either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must return the deposition and certificate, as prescribed in section eight hundred and eighty-three.

1395. If the magistrate returns a certificate that there is sufficient cause to believe the corporation guilty of the offense charged, the grand jury may proceed, or the district attorney file an information thereon, as in case of a natural person held to answer. [In effect April 9th, 1880.]

1396. If an indictment is found, or information filed, the corporation may appear by counsel to answer the same. If it does not thus appear, a plea of not guilty must be entered, and the same proceedings had thereon as in other cases. [In effect April 9th, 1880.]

See 55 Cal. 290.

1397. When a fine is imposed upon a corporation on conviction, it may be collected by virtue of the order imposing it, by the sheriff of the county, out of its real and personal property, in the same manner as upon an execution in a civil action.

CHAPTER X.

ENTITLING AFFIDAVITS.

§ 1401. Affidavits defectively entitled, valid.

1401. It is not necessary to entitle an affidavit or deposition in the action, whether taken before or after indictment or information, or upon an appeal; but if made without a title, or with an erroneous title, it is as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the proceeding, indictment, information, or appeal in which it is made. [In effect April 9th, 1880.]

CHAPTER XI.

ERRORS AND MISTAKES IN PLEADINGS AND OTHER PROCEEDINGS.

§ 1404. When not material.

1404. Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.

Errors in pleadings.—An error must actually prejudice the defendant—44 Cal. 542; see 49 id. 390. A failure to read the indictment, and to state defendant's plea, is not a fatal error—56 Cal. 494. Technical errors or defects are disregarded on appeals—53 Cal. 494.

CHAPTER XII.

DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

- § 1407.** Peace officer must hold property subject to the order of magistrate.
- § 1408.** Order for its delivery to owner.
- § 1409.** Magistrate must deliver it to owner.
- § 1410.** Court in which trial is had may order its delivery.
- § 1411.** Delivered to county treasurer if not claimed in six months.
- § 1412.** Receipt for money, etc., taken from person arrested.
- § 1413.** Record of property alleged to be stolen.

1407. When property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

1408. On satisfactory proof of the ownership of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling it, must order it to be delivered to the owner, on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

1409. If property stolen or embezzled comes into custody of the magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate.

1410. If the property stolen or embezzled has not been delivered to the owner, the court before which a trial is had for stealing or embezzling it may, on proof of his title, order it to be restored to the owner.

1411. If the property stolen or embezzled is not claimed by the owner before the expiration of six months from

the conviction of a person for stealing or embezzling it, the magistrate or other officer having it in custody must, on the payment of the necessary expenses incurred in its preservation, deliver it to the county treasurer, by whom it must be sold and the proceeds paid into the county treasury.

1412. When money or other property is taken from a defendant, arrested upon a charge of a public offense, the officer taking it must at the time give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant and the other of which he must forthwith file with the clerk of the court to which the depositions and statement are to be sent. When such property is taken by a police officer of any incorporated city or town, he must deliver one of the receipts to the defendant, and one, with the property, at once to the clerk or other person in charge of the police office in such city or town.

1413. The clerk in, or person having charge of, the police office in any incorporated city or town, must enter in a suitable book a description of every article of property alleged to be stolen or embezzled, and brought into the office or taken from the person of a prisoner, and must attach a number to each article, and make a corresponding entry thereof.

CHAPTER XIII.

REPRIEVES, COMMUTATIONS, AND PARDONS.

- § 1417. Governor may grant reprieves, commutations, and pardons.
- § 1418. His power in respect to convictions for treason.
- § 1419. To communicate to the Legislature reprieves, commutations, and pardons.
- § 1420. Report of case, how and from whom required.
- § 1421. Notice to district attorney of application for pardon.
- § 1422. Publication of notice.
- § 1423. When two preceding sections are not applicable.

1417. The governor has power to grant reprieves, commutations, and pardons after conviction, for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to the regulations provided in this chapter.

Pardoning power.—The pardoning power, whether exercised under the Federal or State Constitution, is the same in its nature and effect as that exercised by the representatives of the English crown in this country in the colonial times—43 Cal. 439. See Fed. Const. art. ii, § 2, subd. 1; Const. of Cal. art. vii, § 1. A pardon is an act of grace from the power intrusted with the execution of the laws, exempting from punishment which the law inflicts—43 Cal. 439; 7 Peters, 159. The word "pardon" must be construed with reference to its meaning at the time of the adoption of the Constitution—7 Peters, 162; 3 Dall. 386; 5 Peters, 264; 8 Id. 75; 17 How. 456; 18 Id. 316; 1 Abb. U. S. 115; 2 Id. 150. It is construed like a grant, most favorably to the grantee—10 Ark. 284; 1 Strob. 160. The power to pardon extends to all kinds of pardons known to the law as such, either general, special, conditional, or absolute—18 How. 314; 4 Wall. 390.

Where the condition of a pardon is that defendant shall leave the State, and he either does not leave, or, having left, returns, the original sentence revives, and may be enforced—8 Watts & S. 197; 1 Strob. 347; 1 Parker Cr. R. 47; 18 How. 307; but if the time for departure is specified in the pardon, it does not begin to run during sickness or incapacity—2 Caines, 57. A pardon with a condition precedent, does not operate until the condition is performed—8 Watts & S. 197. The governor may pardon as well before as after trial—7 Watts, 152; 45 Pa. St. 372; 46 Id. 357; or, may grant a conditional pardon—8 Watts & S. 197; 1 Bail. 283; 2 Id. 516; 1 Parker Cr. R. 47; 18 How. 314; or, he may pardon after the prisoner has suffered the punishment adjudged for his crime—43 Cal. 439.

His power to reprieve does not depend on his constitutional power to pardon, the designation of the time for execution being no part of

the sentence—17 N. H. 545. A pardon is a release of all fines or imprisonment for the offense—28 Pa. St. 297; 2 Phila. 256; but not of costs—2 Whart. 440; 46 Pa. St. 446; 43 Id. 53; and of such fines and penalties as were payable to the State—3 Id. 126; but the pardoning power cannot decree a repayment of a fine—3 Dutch. 637; and without words of restitution, it does not restore forfeited estates—3 Grant Cas. 158. It may remit a forfeited recognizance after judgment—9 Watts, 142.

The pardoning power is lodged in the executive—13 Wall. 128; 8 Blackf. 229; 1 Abb. U. S. 116; 1 Nott. & McC. 26; 1 Mason, 431; 3 Opin. Att.-Gen. 622. Delivery is essential to give effect to a pardon—3 Ben. 320; 41 Pa. St. 210; 7 Peters, 150; 8 Blatchf. 89. Until delivery, a pardon, though signed and sealed, may be recalled and canceled by the executive or his successor in office—3 Ben. 307. A pardon must be proved by the production of the warrant itself, or its loss must be accounted for—6 Watts, 338; 1 Grant Cas. 329. It removes the disability to testify—43 Cal. 439. See as to its effect—20 Wall. 468; 16 Id. 151; 13 Id. 154; Id. 128; Id. 156; 9 Id. 531; 2 Abb. U. S. 148. A pardon obtained by fraud is void, and may be revoked before actual delivery—3 Ben. 307; 43 Pa. St. 53.

1418. He may suspend the execution of the sentence, upon a conviction for treason, until the case can be reported to the Legislature at its next meeting, when the Legislature may either pardon, direct the execution of the sentence, or grant a further reprieve; *provided*, that neither the governor nor the Legislature shall have power to grant pardons or commutations of sentence in any case where the convict has been twice convicted of felony, after the first day of January, eighteen hundred and eighty, unless upon the written recommendation of a majority of the judges of the Supreme Court. [In effect February 18th, 1880.]

1419. He must, at the beginning of every session, communicate to the Legislature each case of reprieve, commutation, or pardon, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon, or reprieve, and the reasons for granting the same. [In effect February 18th, 1880.]

1420. When an application is made to the governor for a pardon, he may require the judge of the court before which the conviction was had, or the district attorney by whom the action was prosecuted, to furnish him, without delay, with a statement of the facts proved on

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the trial, and of any other facts having reference to the propriety of granting or refusing the pardon.

1421. At least ten days before the governor acts upon an application for pardon, written notice of the intention to apply therefor, signed by the person applying, must be served upon the district attorney of the county where the conviction was had, and proof, by affidavit, of the service must be presented to the governor.

1422. Unless dispensed with by the governor, a copy of the notice must also be published for thirty days from the first publication, in a paper in the county in which the conviction was had.

1423. The provisions of the two preceding sections are not applicable—

1. When there is imminent danger of the death of the person convicted or imprisoned.
2. When the term of imprisonment of the applicant is within ten days of its expiration.

TITLE XI.

Of Proceedings in Justices' and Police Courts and Appeals to Superior Courts.

CHAP. I. PROCEEDINGS IN JUSTICES' AND POLICE
COURTS, §§ 1426-61.

II. APPEALS TO SUPERIOR COURTS, §§ 1466-70.

CHAPTER I.

PROCEEDINGS IN JUSTICES' AND POLICE COURTS.

- § 1426. Proceedings must be commenced by complaint.
- § 1427. When warrant of arrest must issue. Form of warrant.
- § 1428. Minutes, how kept.
- § 1429. The plea, and how put in.
- § 1430. Issue, how tried.
- § 1431. Change of venue, when granted.
- § 1432. Proceedings on change of venue.
- § 1433. Postponement of the trial.
- § 1434. Defendant to be present.
- § 1435. Jury trial, how waived.
- § 1436. Challenges.
- § 1437. Oath of jurors.
- § 1438. Trial, how conducted.
- § 1439. Court to decide questions of law, but not of fact.
- § 1440. Jury may decide in court, or retire.
- § 1441. Verdict of jury, how delivered and entered.
- § 1442. Verdict, when several defendants are tried together.
- § 1443. Jury, when to be discharged without a verdict.
- § 1444. If discharged, defendant may be tried again.
- § 1445. Proceedings on plea of guilty, or on conviction.
- § 1446. Judgment of fine may direct imprisonment.
- § 1447. Defendant, on acquittal, to be discharged. Costs.
- § 1448. Judgment against prosecutor for costs.
- § 1449. Judgment, when to be rendered.
- § 1450. Motion for a new trial, or in arrest of judgment.
- § 1451. New trial, grounds of.
- § 1452. Grounds of motion in arrest of judgment.
- § 1453. Judgment to be entered in the minutes.
- § 1454. Discharge of defendant on judgment of acquittal or fine only.
- § 1455. Judgment of imprisonment, how executed.
- § 1456. Judgment of imprisonment until fine is paid, how executed.
- § 1457. Fines, disposition of.
- § 1458. Defendant may be admitted to bail.
- § 1459. Subpoenas.
- § 1460. Entitling affidavits.
- § 1461. "Police Courts" defined.

1426. All proceedings and actions before a Justices' or Police Court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property, as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint.

Proceedings, how commenced.—The addition "Jr." need not be inserted in a criminal complaint—54 Cal. 409; see 55 id. 228; 45 id. 209. The Penal Code works the same change in criminal actions which has been wrought by the Code of Civil Procedure in civil actions—27 Cal. 567; and see 34 id. 191.

1427. If the justice of the peace, or police justice, is satisfied therefrom that the offense complained of has been committed, he must issue a warrant of arrest, which must be substantially in the following form:

"COUNTY OF —.

"The People of the State of California to any sheriff, constable, marshal, or policeman in this State:

"Complaint upon oath having been this day made before me —, (justice of the peace or police justice, as the case may be) by C. D., that the offense of (designating it generally) has been committed, and accusing E. F. thereof; you are therefore commanded forthwith to arrest the above named E. F. and bring him before me forthwith, at (naming the place).

"Witness my hand and seal at —, this — day of —, A. D. —. A. B."

Warrant.—Where the justice who issued the warrant is absent or unable to act, the party arrested may be taken before some other justice in the same county for examination, etc.—19 Cal. 133. A party may be arrested without a warrant—27 Cal. 572.

1428. A docket must be kept by the justice of the peace, or police justice, or by the clerk of the courts held by them, if there is one, in which must be entered each action, and the proceedings of the court therein.

See 55 Cal. 228; 19 id. 133.

1429. The defendant may make the same plea as upon an indictment, as provided in section ten hundred and

sixteen. His plea must be oral, and entered in the minutes. If the defendant plead guilty, the court may, before entering such plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed; and if it appear to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail, to answer any indictment which may be found against him by the grand jury, or any information which may be filed by the district attorney. [In effect April 9th, 1880.]

See *ante*, § 1016, and note.

1430. Upon a plea other than a plea of guilty, if the parties waive a trial by jury, and an adjournment or change of venue is not granted, the court must proceed to try the case. [In effect February 25th, 1880.]

1431. If the action or proceeding is in a Justice's Court, a change of the place of trial may be had at any time before the trial commences—

1. When it appears from the affidavit of the defendant that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before the justice about to try the case, by reason of the prejudice or bias of such justice, the cause must be transferred to another justice of the same or an adjoining township.

2. When it appears from affidavits that the defendant cannot have a fair and impartial trial, by reason of the prejudice of the citizens of the township, the cause must be transferred to a justice of the township where the same prejudice does not exist.

Subd. 1.—See 18 Cal. 180; 24 Id. 31; 28 Id. 490; *ante*, §§ 1033 and 1034, and notes.

Subd. 2. Sufficiency of affidavits—see 1 Cal. 403; Id. 379; 21 Id. 261; 28 Id. 490; *ante*, §§ 1033 and 1034, and notes.

1432. When a change of the place of trial is ordered, the justice must transmit to the justice before whom the trial is to be had all the original papers in the cause, with

a certified copy of the minutes of his proceedings; and upon receipt thereof, the justice to whom they are delivered must proceed with the trial in the same manner as if the proceeding or action had been originally commenced in his court.

1433. Before the commencement of a trial in any of the courts mentioned in this chapter, either party may, upon good cause shown, have a reasonable postponement thereof.

See *ante*, § 1052, note.

1434. The defendant must be personally present before the trial can proceed.

Presence of defendant.—The plea of "not guilty" may be entered in the absence of defendant—4 Cal. 238; see *ante*, § 1052.

1435. A trial by jury may be waived by the consent of both parties expressed in open court and entered in the docket. The formation of the jury is provided for in chapter one, title three, part one, of the Code of Civil Procedure. [In effect February 25th, 1880.]

1436. The same challenges may be taken by either party to the panel of jurors, or to any individual juror, as on the trial of an indictment for a misdemeanor; but the challenge must in all cases be tried by the court.

Challenges.—See *ante*, §§ 1078-85; grounds of challenge—see *ante*, §§ 1088-88.

1437. The court must administer to the jury the following oath: "You do swear that you will well and truly try this issue between the People of the State of California and A. B., the defendant, and a true verdict render according to the evidence."

1438. After the jury are sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public, and in the presence of the defendant.

1439. The court must decide all questions of law which may arise in the course of the trial, but can give no charge with respect to matters of fact.

See *ante*, §§ 1124-27.

1440. After hearing the proofs and allegations, the jury may decide in court, or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect: "You do swear that you will keep this jury together in some quiet and convenient place; that you will not permit any person to speak to them, nor speak to them yourself, unless by order of the court, or to ask them whether they have agreed upon a verdict; and that you will return them into court when they have so agreed, or when ordered by the court."

See *ante*, § 1128.

1441. The verdict of the jury must in all cases be general. When the jury have agreed on their verdict, they must deliver it publicly to the court, who must enter, or cause it to be entered, in the minutes.

See *ante*, § 1151.

1442. When several defendants are tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the rest may be tried by another jury.

See *ante*, § 1160.

1443. The jury cannot be discharged after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for good cause the court sooner discharges them.

See *ante*, §§ 1139, 1140.

1444. If the jury is discharged, as provided in the last section, the court may proceed again to the trial, in the same manner as upon the first trial, and so on, until a verdict is rendered.

See *ante*, § 1141.

1445. When the defendant pleads guilty, or is convicted, either by the court or by a jury, the court must render judgment thereon of fine or imprisonment, or both, as the case may be. [Approved March 30th, in effect July 1st, 1874.]

1446. A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine. [Approved March 7th, 1874.]

1447. When the defendant is acquitted, either by the court or by the jury, he must be immediately discharged; and if the court certify in the minutes that the prosecution was malicious or without probable cause, it may order the prosecutor to pay the costs of the action, or to give satisfactory security by a written undertaking, with one or more sureties, to pay the same within thirty days after the trial.

1448. If the prosecutor does not pay the costs, or give security therefor, the court may enter judgment against him for the amount thereof, which may be enforced in all respects in the same manner as a judgment rendered in a civil action.

1449. After a plea or verdict of guilty, or after a verdict against the defendant, on a plea of a former conviction or acquittal, the court must appoint a time for rendering judgment, which must not be more than two days nor less than six hours after the verdict is rendered, unless the defendant waive the postponement. If postponed, the court may hold the defendant to bail to appear for judgment. [Approved March 30th, in effect July 1st, 1874.]

1450. At any time before judgment, defendant may move for a new trial or in arrest of judgment.

See *ante*, § 1182.

1451. A new trial may be granted in the following cases:

1. When the trial has been had in the absence of the defendant, unless he voluntarily absent himself, with full knowledge that a trial is being had.
2. When the jury has received any evidence out of court.

3. When the jury has separated without leave of the court, after having retired to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case.

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors.

5. When there has been error in the decision of the court, given on any question of law arising during the course of the trial.

6. When the verdict is contrary to law or evidence.

7. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial; but when a motion for a new trial is made upon this ground, the defendant must produce at the hearing the affidavits of the witnesses by whom such newly-discovered evidence is expected to be given.

See *ante*, §§ 1179-82.

1452. The motion in arrest of judgment may be founded on any substantial defect in the complaint, and the effect of an arrest of judgment is to place the defendant in the same situation in which he was before the trial was had.

A motion is an application for an order made *viva voce* to a court or judge, and making out and filing a written application is not sufficient. The attention of the court must be called to it, and the court moved to grant it—41 Cal. 650.

1453. If the judgment is not arrested, or a new trial granted, judgment must be pronounced at the time appointed, and entered in the minutes of the court.

1454. If judgment of acquittal is given, or judgment imposing a fine only, without imprisonment for non-payment, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.

1455. When a judgment of imprisonment is entered, a certified copy thereof must be delivered to the sheriff,

marshal, or other officer, which is a sufficient warrant for its execution.

1456. When a judgment is entered imposing a fine, or ordering the defendant to be imprisoned until the fine is paid, he must be held in custody during the time specified in the judgment, unless the fine is sooner paid.

Judgment.—A judgment that defendant be fined three hundred dollars, and that in default of payment he be imprisoned in the county jail not exceeding three hundred days, is a substantial compliance with section 1205 of this Code—54 Cal. 205.

1457. Upon payment of the fine, the officer must discharge the defendant, if he is not detained for any other legal cause, and apply the money to the payment of the expenses of the prosecution, and pay over the residue, if any, within ten days, to the county or city treasurer, according as the offense is prosecuted in a justice's or police court. If a fine is imposed, and paid before commitment, it must be applied as prescribed in this section.

This section and section 1570, *post*, are to be construed together—45 Cal. 245.

1458. The defendant, at any time after his arrest, and before conviction, may be admitted to bail. The provisions of this Code relative to bail are applicable to bail in Justices, or Police Courts.

See *ante*, §§ 822-29, 1268-1317.

1459. The justice or judge of either of the courts mentioned in this chapter may issue subpoenas for witnesses, as provided in section thirteen hundred and twenty-six, and punish disobedience thereof, as provided in section one thousand three hundred and thirty-one.

1460. The provisions of section one thousand four hundred and one, in respect to entitling affidavits, are applicable to proceedings in the courts mentioned in this chapter.

1461. The term "Police Courts," as used in this and the succeeding chapter, includes Police Judges' Courts, Police Courts, and all courts held by mayors or recorders in incorporated cities or towns.

CHAPTER II.

APPEALS TO SUPERIOR COURTS.

- § 1466. Appeals, when allowed.
- § 1467. Appeals, how taken, heard, and determined.
- § 1468. Statement on appeal.
- § 1469. If new trial granted, in what court had.
- § 1470. Proceedings, if appeal is dismissed or judgment affirmed.

1466. Either party may appeal to the Superior Court of the county from a judgment of a Justice's or Police Court, in like cases and for like cause as appeals may be taken to the Supreme Court. [In effect April 12th, 1880.]
See 26 Cal. 635.

1467. The appeal is taken, heard, and determined as provided in title nine, part two, of this Code.
See *ante*, §§ 1235-65.

1468. The appeal to the Superior Court from the judgment of a Justice's or Police Court is heard upon a statement of the case settled by the justice or police judge, embodying such rulings of the court as are excepted to, which statement must be filed with and settled by the court within ten days after filing notice of appeal. [In effect April 12th, 1880.]
See 26 Cal. 635.

1469. If a new trial is granted upon appeal, it must be had in the Superior Court. [In effect April 12th, 1880.]
See 26 Cal. 635.

1470. If the appeal is dismissed or the judgment affirmed, a copy of the order of dismissal or judgment of affirmance must be remitted to the court below, which may proceed to enforce its sentence.

Jurisdiction.—The Superior Court has jurisdiction on habeas corpus to issue any and all process necessary to the execution of its judgment, as over a person arrested on a bench-warrant after affirmance of judgment—54 Cal. 345; see Const. Cal. art. 6, § 5.

TITLE XII.

Of Special Proceedings of a Criminal Nature.

- CHAP. I. OF THE WRIT OF HABEAS CORPUS, §§ 1473-1505.
- II. OF CORONERS' INQUESTS AND DUTIES OF CORONERS, §§ 1510-19.
- III. OF SEARCH-WARRANTS, §§ 1523-42.
- IV. PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE, §§ 1547-58.
- V. MISCELLANEOUS PROVISIONS RESPECTING SPECIAL PROCEEDINGS OF A CRIMINAL NATURE, §§ 1562-4.

PEN. CODE.—49.

CHAPTER I.

OF THE WRIT OF HABEAS CORPUS.

- § 1473. Who may prosecute writ.
- § 1474. Application for, how made.
- § 1475. By whom issued, and before whom returnable.
- § 1476. Writ must be granted without delay.
- § 1477. Writ, what to contain.
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- § 1495. Defect of form in the writ immaterial, when.
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- § 1497. Warrant may issue instead of writ, in certain cases.
- § 1498. Warrant may include person charged with illegal detention.
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- § 1500. Return and hearing on.
- § 1501. Party may be discharged or remanded.
- § 1502. Writ and process may issue at any time.
- § 1503. By whom issued and when returnable.
- § 1504. Where returnable.
- § 1505. Damages for failure to issue or obey the writ.

1473. Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of *habeas corpus*, to inquire into the cause

of such imprisonment or restraint. [Approved March 30th, in effect July 1st, 1874.]

Who may prosecute.—A prisoner is entitled to a writ of habeas corpus as a matter of right, except when he is committed or detained under a final judgment—16 Barb. 362. It may be employed to effect the release of a person to whom a pardon has been addressed—8 Blatchf. 89; 2 Abb. U. S. 382; 8 How. Pr. 478; 2 Parker Cr. R. 650. A writ of habeas corpus *ad testificandum* may be allowed to bring up a prisoner charged, in execution upon a *ca. sa.*, to testify in relation to his own application for a discharge as an insolvent—5 Cowen, 176. It is not the proper remedy for a person imprisoned on a *ca. sa.* irregularly issued; the remedy is by motion and affidavit—4 Johns. 317. See Code of Civ. Proc. §§ 33, 34.

Persons out on bail are not entitled to this writ directed to their bail—McCahon, 152. Whether the court may, by a writ of habeas corpus to the executive officer of another court, take a prisoner from the custody of the latter—*query?*—7 Cush. 285. It cannot be used as a writ of quo warranto to decide a question of usurpation of office—3 Barb. 162. The governor of a State is not vested with the power of its suspension under a Constitution giving him power to suppress insurrection—64 N. C. 802. The prerogative of suspending the writ belongs exclusively to Congress—1 Abb. U. S. 212; 21 Ind. 370; Taney, 246; 16 Wis. 359; and the executive discretion may be inquired into in every case where the liberty of the subject is involved—5 Cal. 238; see Fed. Const. art. 1, § 9, subd. 2; Const. Cal. art. 1, § 5.

Writ, when it lies.—The writ of habeas corpus may be appealed to for the purpose of settling the question of bail, where there is probable cause against the party—52 Ala. 311; 54 Cal. 75; 2 Ashm. 227; *id.* 247; 3 Brev. 89; 15 Fla. 633; Dudley, 296; 3 Ind. 293; 11 Leigh, 665; 17 Mass. 116; *id.* 175; 8 Mo. 483; 66 Miss. 39; 30 *id.* 681; 2 Pittsb. Rep. 362; 5 Rand. 646; see 43 Miss. 1. It lies for redress under a void sentence—8 Blatchf. 89; 18 Wall. 163; 49 Mo. 291; 9 Nev. 43; 60 N. Y. 559; 3 Mich. 207; 30 *id.* 502; 41 Tex. 488; but not where the error lies simply in the mode of expressing the sentence—26 Int. Rev. Rec. 11. So, the averments of a sentence of conviction cannot be disputed on a writ of habeas corpus, except for fraud, non-identity, or want of jurisdiction—43 Cal. 455; 49 *id.* 160.

A regular demand under the act of Congress, and warrant of the governor to surrender a fugitive, cannot be inquired into on habeas corpus—4 Har. (Del.) 572. The question whether the jury was properly or legally discharged because of inability to agree cannot be tried on habeas corpus—41 Cal. 219. The writ cannot be used by a State court for the purpose of revising arrests under Federal process—21 How. 506; 13 Wall. 397; 1 Abb. U. S. 140; 37 Ala. 474; 9 Johns. 239; 11 Mich. 298; 5 Nev. 154; 27 N. J. L. 409; 25 Wis. 390; 11 Blatchf. 79.

1474. Application for the writ is made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, and must specify—

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them, if they are not known.

2. If the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists.

3. The petition must be verified by the oath or affirmation of the party making the application.

Application, how made.—The writ will not be granted unless sufficient cause be shown—7 Cush. 285; or if nugatory—7 Wheat. 33; 1 Serg. & R. 353; 20 Ala. 89; 11 Bush. 628; 26 Pa. St. 9; 10 Nev. 212; 15 Wis. 179; see 18 Wall. 163. An affidavit that affiant is unlawfully detained will be sufficient to entitle him to a writ of habeas corpus without other allegation—1 Smedes & M. 149. The petition should state facts on which the charge of illegal restraint rests—8 Kan. 99; 10 Nev. 212; 12 Id. 87; see 1 Smedes & M. 149; 1 Cranch C. C. 159; 6 Ark. 28; 26 Ill. 532; 52 Id. 311; verified by affidavit or attested by witnesses—13 Abb. Pr. 8; 44 Ala. 17; Dudley, 46; 4 Cranch C. C. 75. The application may be made by any relative or appropriate friend—3 Ben. 442; 3 Hill, 399; 24 Pick. 227; 10 Id. 274; 107 Mass. 154; 42 Iowa, 598; but not a mere stranger—2 McAr. 683; 1 Cush. 385. Where it appeared that the petitioner was in custody under a commitment after a conviction for felony, the writ was refused—40 Tex. 451. Where the petition shows that the petitioner, if brought before the court, could not be discharged, the writ will not be granted—7 Cush. 285.

The doctrine of *res adjudicata* does not apply to proceedings on habeas corpus—28 Cal. 247; 2 Id. 424. The decision of one court or judge refusing to discharge on habeas corpus is not a bar to another application before another court or judge—28 Cal. 247.

By whom issued.—The judiciary have jurisdiction to investigate cases where a party is arrested as a fugitive from justice from other States—5 Cal. 238; see *post*, § 1548. State courts and judges have no authority to release a prisoner on habeas corpus, when he is in the custody of the authorities of the United States, pursuant to a judgment by a Federal tribunal having jurisdiction—49 Cal. 162; 21 How. 523. A State court will not intervene in extradition cases when the demandant is a foreign sovereign—59 N. Y. 110; 50 N. Y. 321; 45 How. Pr. 296; Id. 301; 10 Serg. & R. 125.

To deprive State courts of jurisdiction on habeas corpus within State territory ceded to the United States, such jurisdiction must have been expressly surrendered by the State—7 Cowen. 471. Where a person is unlawfully held under a judgment of a Federal court, the State court will examine the record, and upon ascertaining the fact will discharge him—18 Wall. 163; but a State court will not grant a writ of habeas corpus to a person committed under an act of Congress—Charlt. 142.

When the inquiry involves a question of conflict between State and Federal process, counsel have no right to appear in defense of the State process, without being duly authorized to do so—2 Wall, Jr. 821. The writ should not issue to run out of the county, unless for good cause shown—11 Cal. 222. The allowance of the writ in term-time is not obligatory, but rests in the sound legal discretion of the court, but its allowance may be obligatory upon the judges in their individual capacity—11 Cal. 222; and if local judges refuse to act, resort may be had to officers out of the county—Id. The statement in the indictment of some offense known to the law, is essential to the jurisdiction of the court, and is, therefore, a fact to be inquired into—22 Cal. 178. Where a court of competent jurisdiction refuses to discharge on habeas corpus, a court of concurrent jurisdiction may decline to issue the writ in the same case, unless there be an allegation of new facts—5 Bin. 304; see 43 Tex. 579.

1475. The writ of habeas corpus may be granted—

1. By the Supreme Court, or any justice thereof, upon petition by or on behalf of any person restrained of his liberty in this State. When so issued it may be made returnable before the court, or any justice thereof, or before any Superior Court, or any judge thereof.

2. By the Superior Courts, or a judge thereof, upon petition by or on behalf of any person restrained of his liberty, in their respective counties. [In effect February 18th, 1880.]

1476. Any court or judge authorized to grant the writ, to whom a petition therefor is presented, must, if it appear that the writ ought to issue, grant the same without delay.

1477. The writ must be directed to the person having custody of or restraining the person on whose behalf the application is made, and must command him to have the body of such person before the court or judge before whom the writ is returnable, at a time and place therein specified.

1478. If the writ is directed to the sheriff or other ministerial officer of the court out of which it issues, it must be delivered by the clerk to such officer without delay, as other writs are delivered for service. If it is directed to any other person, it must be delivered to the sheriff, and be by him served upon such person by delivering the same to him without delay. If the person to whom the writ is directed cannot be found, or refuses admittance to the officer or person serving or delivering such writ, it may be served or delivered by leaving it at the residence of the person to whom it is directed, or by affixing it to some conspicuous place on the outside either of his dwelling-house or of the place where the party is confined or under restraint.

How served.—The writ must be directed to the person having custody—7 Ind. 611; 3 Wis. 1; 38 How. Pr. 402; on whom it is to be served personally—2 South. 545; unless service is waived by acceptance, ex-

press or implied—60 Ill. 390; and due notice to be given to the prosecuting officer having jurisdiction of the offense—3 McLean, 121; 3 Ind. 293; 14 Wend. 48. Where the writ was issued in open court, and read to the relator, who was present with and had the custody of the prisoner, his failure to ask for the writ for the purpose of making his return, was an acceptance of service and waiver of its delivery to him—60 Ill. 390. Where a person in prison under sentence is needed for trial on another charge, the writ should be issued, directed to the keeper of the prison, stating the object for which he is wanted, and commanding the keeper to produce him in court—38 Conn. 126.

1479. If the person to whom the writ is directed refuses, after service, to obey the same, the court or judge, upon affidavit, must issue an attachment against such person, directed to the sheriff or coroner, commanding him forthwith to apprehend such person, and bring him immediately before such court or judge; and upon being so brought, he must be committed to the jail of the county until he makes due return to such writ, or is otherwise legally discharged.

Disobedience of writ.—Where there is a delay in obedience to the writ, an attachment will be granted to enforce obedience on proof of service of the writ—2 Cliff. 83; 60 Ill. 390; 18 Johns. 152; 64 N. C. 802; *Id.* 816; 59 Pa. St. 425; 2 South, 545.

1480. The person upon whom the writ is served must state in his return, plainly and unequivocally.

1. Whether he has or has not the party in his custody, or under his power or restraint.

2. If he has the party in his custody or power, or under his restraint, he must state the authority and cause of such imprisonment or restraint.

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the court or judge on the hearing of such return.

4. If the person upon whom the writ is served had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause, and by what authority, such transfer took place.

5. The return must be signed by the person making the same, and, except when such person is a sworn public officer, and makes such return in his official capacity, it must be verified by his oath.

Return of writ.—The sickness of the party must be specially returned and verified by the affidavit of a medical attendant or nurse—2 Tyler, 269. A copy of the commitment, if not filed with the petition, must be produced—2 Mass. 549. The cause of detention must be returned—12 Wis. 52; and facts justifying it must be set forth—4 Johns. 317; 2 Maule & S. 226. The material facts of the return which are not denied by the prisoner must be taken as true—1 Park. Cr. R. 129.

A rule to appear upon a habeas corpus cannot be taken before the return day, though the writ be actually returned before that time—6 Cowen, 391. If the warden of the prison has not a certified copy of the judgment, the court or judge will give a reasonable time to procure one, and, if obtained, will quash the writ—28 Cal. 247.

1481. The person to whom the writ is directed, if it is served, must bring the body of the party in his custody or under his restraint, according to the command of the writ, except in the cases specified in the next section.

1482. When, from sickness or infirmity of the person directed to be produced, he cannot, without danger, be brought before the court or judge, the person in whose custody or power he is may state that fact in his return to the writ, verifying the same by affidavit. If the court or judge is satisfied of the truth of such return, and the return to the writ is otherwise sufficient, the court or judge may proceed to decide on such return and to dispose of the matter as if such party had been produced on the writ, or the hearing thereof may be adjourned until such party can be produced.

Non-production of body.—The excuse for non-production of the body must be direct and not evasive; as, that the party has not the person in his possession, custody, or power—5 Cranch C. C. 622; 10 Johns. 323; and when it is explicit and is not impugned, the writ should be quashed—1 Brewst. 541; 3 id. 563; see McCahon, 152.

1483. The court or judge before whom the writ is returned must, immediately after the return, proceed to hear and examine the return, and such other matters as may be properly submitted to their hearing and consideration.

Hearing on return.—Where a court of record has jurisdiction, its action cannot be reviewed on habeas corpus, no matter how gross may

be the mistakes of law or fact, except in cases of fraud—44 Cal. 32; the remedy is by writ of error—35 Ga. 435; 7 Ohio St. 81; 1 Whart. 439; 8 Serg. & R. 71; nor will the judgment of a court-martial be reviewed on habeas corpus—10 Hun. 63; 11 Serg. & R. 93; 2 Sawy. 43; nor of a military commission—1 Wall. 243; nor of a naval court-martial—2 Sawy. 396; nor summary convictions by justices of the peace—1 City H. Rec. 153; nor committals for contempt by a court having authority—13 Abb. Pr. 459; 5 Hill, 164; 12 Nev. 158; 26 Pa. St. 9; 39 id. 9; unless the court transcends the statutory limits of its authority—15 Abb. Pr. N. S. 38; 24 La. An. 119; 24 Tex. 668.

The writ of habeas corpus is not given for the purpose of reviewing judgments or orders—51 Cal. 376; 35 id. 100; so, whether an order holding an accused person to answer a criminal charge is erroneous or was erroneously entered, is not reviewable on habeas corpus—51 Cal. 376. The inquiry cannot go behind the sentence of a court of competent jurisdiction—3 McLean, 89; 2 Gratt. 588; 3 Parker Cr. R. 562. It is not the province of the writ to review errors or the sufficiency of errors before it, but only to ascertain whether there was jurisdiction to pronounce the sentence of commitment, and whether the commitment was in due form—31 Cal. 619; 35 id. 101; 1 Barb. 340; 4 Mo. 614; 4 Parker Cr. R. 9; 5 Hill, 167; 7 Abb. Pr. 96. If the court whose judgment is assailed be one of competent jurisdiction, the only inquiry will be whether the judgment, as rendered, is, on its face, certain and definite in terms—43 Cal. 457; and this rule applies to judgments of a police court—43 Cal. 457; 47 id. 128.

The averments of a sentence of conviction cannot be disputed on a writ of habeas corpus unless impeachable for fraud, non-identity, or want of jurisdiction—43 Cal. 455; 49 id. 160; 93 U. S. 18; 2 Sawy. 369; 12 Allen, 191; 2 Gratt. 588; 45 Ala. 15; 51 id. 34; 1 Hill, 377; 2 Pick. 172; 10 id. 434; 4 Parker Cr. R. 9; 9 Serg. & R. 71; 25 Ohio St. 428; 74 N. C. 607; 44 Mo. 181; 40 Tex. 451.

A State court may determine whether the Federal arrest is legal—42 Barb. 479; Bright, N. P. 4; 1d. 269; 7 Cush. 285; 3 Grant Cas. 437; 1d. 447; 12 N. H. 194; 24 Pick. 227; 7 Pa. St. 336; 6 Ohio St. 55; 9 id. 78; 44 Barb. 106; 45 id. 143; 24 How. Pr. 247; 25 id. 149; *contra*, 40 Barb. 62; 45 id. 259; 45 How. Pr. 294; but see 107 Mass. 172; 16 Iowa, 600; 23 id. 89; 29 Ind. 505; 11 Blatchf. 79. That it is the duty of the Federal marshal to resist such process—21 How. 506; 13 Wall. 337; 5 McLean, 92; 6 id. 35; yet the writ may issue from a Federal court to relieve a person under arrest by State court process, when in alleged violation of the Constitution of the United States—1 Abb. U. S. 140; 2 id. 265; 2 Wall. Jr. 521; 2 Woods. 428; 5 Am. Law Reg. 659; see 3 Dill. 116; 1 Hughes, 571; but it is otherwise where the matter relates solely to State jurisdiction—3 How. 103; 5 McLean, 174; 1 Gall. 1.

Where a court of record has jurisdiction, its action cannot be collaterally impeached, except for fraud—44 Cal. 32; 1 Hill, 154; 63 Me. 129; 36 Miss. 627; 27 Mich. 1; 30 id. 266; 9 Nev. 71; 6 id. 309; 26 Pa. St. 279; 3 Tex. Ct. App. 345; 6 Vt. 509; 2 Parker Cr. R. 650; 1 Watts, 66; 34 Wis. 177; 41 id. 617. The question, whether an order holding an accused person to answer on a criminal charge is erroneous or was irregularly entered, cannot be considered on an application for the discharge of the accused on habeas corpus—51 Cal. 375. The court will not inquire into the regularity of the proceedings before the judge who issued the warrant, but only as to his colorable authority—1 Barb. 340.

Where it appeared that the prisoner was detained under a warrant issued upon a complaint on oath, it is proper for the court to go behind the warrant and inquire into the legality of the imprisonment—1 Parker Cr. R. 224; 1d. 429. Where it appears that the prisoner is detained on a commitment for examination as an alleged fugitive from justice, the fact that his examination is not finished is no ground

for omitting to inquire into the legality of his detention—1 Sand. 701. The only inquiry is, whether the warrant on which he is arrested recites that he has been demanded by the executive of the State from which he is charged to have fled, and that a copy of the indictment, or an affidavit charging him with having committed crime, certified as authentic, has been presented—9 Wend. 212.

Where the return states that the prisoner is detained by virtue of process, the validity and existence of the process are the only facts which can be investigated. The sufficiency of the evidence on which it issued cannot be inquired into—4 Barb. 31. Formerly the Supreme Court could exercise its appellate jurisdiction by means of the writ—1 Cal. 143; in cases of contempt as well as others—7 id. 181; but under the Constitution as amended, the jurisdiction is original—25 id. 26. On hearing of the writ, the constitutionality of the law authorizing the arrest will not be considered—47 Mo. 164.

1484. The party brought before the court or judge, on the return of the writ, may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. The court or judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and have full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.

1485. If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, such court or judge must discharge such party from the custody or restraint under which he is held.

Discharge of party.—If the arrest be on void process, the relator should be discharged—3 Blinn. 33; 1 Dudley, 235; 2 Va. Cas. 504; as where the warrants had no seal—2 Cranch, 612; 36 Me. 366; 2 R. I. 436; 3 Yerg. 392. Where a prisoner shows that he is held under a judgment of a Federal court, made without authority of law, the Supreme Court of the United States will, on habeas corpus, look into the record to ascertain that fact, and if found to be so, will discharge the prisoner—18 Wall. 163; 43 Cal. 455; 46 id. 112; 9 Nev. 43; 49 Mo. 291.

Where a prisoner is brought before a judge, he may inquire into the jurisdiction of the tribunal by which he was committed, and if he can show it had no jurisdiction, he is entitled to his discharge—61 Barb. 619.

Where it appears from the return of the writ that the prisoner is in custody under process of any State court, judge, or officer thereof,

he shall be discharged, if it appears that the court, judge, or officer exceeded its jurisdiction, or that the warrant was issued in a case not allowed by law—35 Cal. 108. He may proceed to inquire whether the indictment charges any offense known to the law, and upon determining that it does not, may discharge the prisoner—22 Cal. 178.

A party committed for contempt may be discharged where it appears that the suit in which the contempt occurred has abated—7 Cal. 175. When the process is from a sister State, and is regular, a discharge will not be granted, supposing the identity of the party and the genuineness of the record be established—2 Cal. 59; 5 id. 237; 3 McLean, 121; 3 Hughes, 263; 56 N. Y. 182; 51 How. Pr. 422; 43 Tex. 197; 122 Mass. 324; 9 Wend. 212; 32 N. J. L. 141; 4 Har. (Del.) 572.

Where females are brought before a court on a return to the writ, and the person in whose custody they are neither shows nor claims any right to detain them, they will be discharged—1 Cal. 157.

Where there are two grounds of detention, one good and the other bad, the court may discharge the prisoner as to the void cause, and remand him as to the other—14 Wend. 472. If after discharge by one judge the relator be rearrested, he should be discharged by another judge of co-ordinate powers—2 Brewst. 545; 1 Parker Cr. R. 129; 5 Binn. 304; 43 Tex. 579.

A person committed upon an indictment for murder cannot be discharged upon habeas corpus by proving his innocence, but must abide the event of a trial—1 Hill, 377; 5 Parker Cr. R. 77.

After judgment reversed in the Supreme Court, the refusal of the County Court to order the prisoner brought back for a new trial is no ground for a discharge on habeas corpus—46 Cal. 113. An order of an officer discharging a prisoner from custody is good until reversed, if he have no jurisdiction, otherwise the order may be treated as void—7 Hill, 301.

The refusal of the lower court, after the prisoner has been sentenced and sent to the State prison, to order him brought back to the county for new trial on reversal of the judgment on appeal, is no ground for his discharge from custody on habeas corpus—46 Cal. 113. The discharge of the prisoner is a protection to the sheriff who had him in custody, although the discharge was erroneously granted—3 Barb. 37. A discharge is no bar to subsequent proceedings for the same offense—56 N. Y. 182; 1 La. An. 413; 43 Ill. 508; 3 Thomp. & C. 183; 1 Hun. 27; *contra*, 64 Mo. 205. An improper discharge of a jury does not operate as an acquittal—27 Cal. 294.

1486. The court or judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody—

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree.

When to remand prisoner.—To authorize the remand of a prisoner held on an irregular commitment, the testimony must be produced on

the return of the writ, or at the hearing. A subsequent day is too late—1 Sand. 701; 3 Zab. 311. If it appears that the commitment to the State prison is void, and, further, that there is a valid judgment rendered by a competent court of which a certified copy can be obtained, the court or judge will order the prisoner to be retained until a certified copy can be obtained, and if obtained, remand him—31 Cal. 619.

If a probable cause of guilt is shown at the hearing he must be held to trial, though the offense proved is not specifically that charged—2 Bailey, 289; 4 Har. (Del.) 575; 65 Me. 129; 9 Ga. 73; 6 Rand. 678. Where the offense charged is so defectively set forth in the warrant of commitment that the party cannot be held thereunder, but it appears he ought not to be discharged, the judge ought to hold the party for examination, and cause the complainants and witnesses to attend before him for that purpose—19 Cal. 133.

1487. If it appears on the return of the writ that the prisoner is in custody by virtue of process from any court of this State, or judge or officer thereof, such prisoner may be discharged in any of the following cases, subject to the restrictions of the last section—

1. When the jurisdiction of such court or officer has been exceeded.

2. When the imprisonment was at first lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to a discharge.

3. When the process is defective in some matter of substance required by law, rendering such process void.

4. When the process, though proper in form, has been issued in a case not allowed by law.

5. When the person having the custody of the prisoner is not the person allowed by law to detain him.

6. Where the process is not authorized by any order, judgment, or decree of any court, nor by any provision of law.

7. Where a party has been committed on a criminal charge without reasonable or probable cause.

1488. If any person is committed to prison, or is in custody of any officer on any criminal charge, by virtue of any warrant of commitment of a justice of the peace, such person must not be discharged on the ground of any mere defect of form in the warrant of commitment.

Not discharged for formal defects.—Where a party is held in custody under an order regular on its face, he cannot be discharged on

habeas corpus because of error; the remedy is by appeal—44 Cal. 35; 35 Id. 100; 44 Id. 579; 51 Id. 376. Formal defects in process cannot be corrected by habeas corpus. The remedy is by motion to set it aside, or by certiorari—3 Barb. 37. A prisoner committed on final process will not be discharged by reason of defects in the judgment, unless it is absolutely void—1 Cal. 9.

The court will not discharge the prisoner for merely formal defects, or variance, or misstatements of the offense—28 Cal. 247; 4 Cranch C. C. 75; 2 Id. 612; 4 Dall. 413; 1 Hill, 154; 4 Har. (Del.) 575; 18 Johns. 305; 5 Cowen, 12; 11 Nev. 287. The omission of the name of the party in a commitment to appear before the grand jury is not such a defect as will entitle the party to discharge on habeas corpus—42 Cal. 199.

The action of the court on a writ of habeas corpus is not reviewable on error—2 Cal. 424; 10 Gray, 240; 6 Johns. 429; 4 Pen. & W. 82; 29 Pa. St. 129; 4 Gill. 304; 34 Iowa, 184; 5 Ala. 18; 9 Miss. 690; 1 La. An. 413; 44 Tex. 467; 10 Cent. L. J. 5; *contra*, 6 Johns. 337; unless irremediable injury may be done—14 Peters, 540; 18 How. 307; 6 McLean, 380; and see 33 Conn. 321; 31 Md. 329; 36 Ala. 306; 2 Tex. Ct. App. 566; 28 Ill. 410.

The decision of an officer having power to issue and decide upon a writ of habeas corpus upon any subsequent application is conclusive between the same parties when the subject-matter is the same, and there are no new facts—1 Parker Cr. R. 129; 5 Id. 113; but a prior decision under a previous writ is not conclusive where the first decision cannot be reviewed by the writ of error—6 Id. 276.

1489. If it appears to the court or judge, by affidavit or otherwise, or upon the inspection of the process or warrant of commitment, and such other papers in the proceedings as may be shown to the court or judge, that the party is guilty of a criminal offense, or ought not to be discharged, such court or judge, although the charge is defective or unsubstantially set forth in such process or warrant of commitment, must cause the complainant or other necessary witnesses to be subpoenaed to attend at such time as ordered, to testify before the court or judge; and upon the examination he may discharge such prisoner, let him to bail, if the offense be bailable, or recommit him to custody, as may be just and legal.

Examination of case.—When the case does not rest on the return, the court may go into the merits—1 Parker Cr. R. 187; Id. 224; see 30 N. J. L. 274. The justice who issued the warrant, and the clerk of his court, may be witnesses to prove on what papers the warrant issued—3 Zab. 311. In a proceeding by habeas corpus, in the United States District Court, the petitioner is a competent witness as to a question of fact—6 Parker Cr. R. 276. On a traverse to a return, the process by which the prisoner is held being regular on its face, the burden of proof is on the prisoner—1 Sand. 701.

The prisoner may show the grounds of his arrest and detention by the best testimony at hand, or which he can procure with reasonable diligence—1 Sand. 701; 3 Zab. 311; and evidence *alibide* is admissible—5 Parker Cr. R. 62. Where a person is committed by the magis-

trate, additional evidence may be submitted to show that the prisoner is legally detained—4 Parker Cr. R. 656.

It is not competent to retry issues of fact, or to review the proceedings of the trial—19 Cal. 130. If bail has been taken, and is deemed sufficient security for his appearance, the court may permit it to stand; if not, the court may order him into custody, either for the purpose of procuring additional bail or for his detention until trial—35 Cal. 108. Where it does not appear to the court that the prisoner is in fact guilty of any criminal offense, he must be discharged—49 Cal. 437; see 54 Id. 103.

1490. When a person is imprisoned or detained in custody on any criminal charge, for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail, upon averring that fact in his petition, without alleging that he is illegally confined.

Writ for purpose of bail.—Where application is made to be admitted to bail before indictment, inquiry as to guilt or innocence must be confined to the proof on which the commitment was ordered—1 Hill, 377; 5 Parker Cr. R. 77. The indictment is conclusive as to the amount of bail—19 Cal. 539; 1 Burr. Tri. 310; 3 Wash. C. C. 224; 4 Parker Cr. R. 651; but see 34 Ala. 270; 33 Ill. 497; 20 N. H. 160; 2 Parker Cr. R. 570; 43 Miss. 1; 25 Tex. 46. No appeal lies from an order admitting a party to bail on habeas corpus—40 Cal. 627; see 54 Id. 103.

1491. Any judge before whom a person who has been committed on a criminal charge may be brought on a writ of habeas corpus, if the same is bailable, may take an undertaking of bail from such person as in other cases, and file the same in the proper court.

See 54 Cal. 103.

1492. If a party brought before the court or judge on the return of the writ is not entitled to his discharge, and is not bailed, where such bail is allowable, the court or judge must remand him to custody or place him under the restraint from which he was taken, if the person under whose custody or restraint he was is legally entitled thereto.

See 54 Cal. 103.

1493. In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto.

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1494. Until judgment is given on the return, the court or judge before whom any party may be brought on such writ may commit him to the custody of the sheriff of the county, or place him in such care or under such custody as his age or circumstances may require.

1495. No writ of habeas corpus can be disobeyed for defect of form, if it sufficiently appear therefrom in whose custody or under whose restraint the party imprisoned or restrained is, the officer or person detaining him, and the court or judge before whom he is to be brought.

1496. No person who has been discharged by the order of the court or judge upon habeas corpus can be again imprisoned, restrained, or kept in custody for the same cause, except in the following cases:

1. If he has been discharged from custody on a criminal charge, and is afterwards committed for the same offense, by legal order or process.

2. If, after a discharge for defect of proof, or for any defect of the process, warrant, or commitment in a criminal case, the prisoner is again arrested on sufficient proof and committed by legal process for the same offense.

1497. When it appears to any court or judge, authorized by law to issue the writ of habeas corpus, that any one is illegally held in custody, confinement, or restraint, and that there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ of habeas corpus can be enforced, such court or judge may cause a warrant to be issued, reciting the facts, and directed to the sheriff, coroner, or constable of the county, commanding such officer to take such person thus held in custody, confinement, or restraint, and forthwith bring him before such court or judge, to be dealt with according to law.

1498. The court or judge may also insert in such warrant a command for the apprehension of the person charged with such illegal detention and restraint.

1499. The officer to whom such warrant is delivered must execute it by bringing the person therein named before the court or judge who directed the issuing of such warrant.

1500. The person alleged to have such party under illegal confinement or restraint may make return to such warrant, as in case of a writ of habeas corpus, and the same may be denied, and like allegations, proofs, and trial may thereupon be had as upon a return to a writ of habeas corpus.

1501. If such party is held under illegal restraint or custody, he must be discharged; and if not, he must be restored to the care or custody of the person entitled thereto.

1502. Any writ or process authorized by this chapter may be issued and served on any day or at any time.

1503. All writs, warrants, process, and subpœnas authorized by the provisions of this chapter must be issued by the clerk of the court, and, except subpœnas, must be sealed with the seal of such court, and served and returned forthwith, unless the court or judge shall specify a particular time for any such return.

1504. All such writs and process, when made returnable before a judge, must be returned before him at the county seat, and there heard and determined. [In effect February 18th, 1880.]

1505. If any judge, after a proper application is made, refuses to grant an order for a writ of habeas corpus, or if the officer or person to whom such writ may be directed refuses obedience to the command thereof, he shall forfeit and pay to the person aggrieved a sum not exceeding five thousand dollars, to be recovered by action in any court of competent jurisdiction.

CHAPTER II.

OF CORONERS' INQUESTS AND DUTIES OF CORONERS.

- § 1510. Coroner to summon jury to inquire into cause of death.
- § 1511. Jurors to be sworn.
- § 1512. Witnesses to be summoned.
- § 1513. Witnesses compelled to attend.
- § 1514. Verdict of jury in writing. What to contain.
- § 1515. Testimony in writing, and where filed.
- § 1516. Exception.
- § 1517. Coroner to issue warrant, when.
- § 1518. Form of warrant.
- § 1519. How served.

1510. When a coroner is informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, he must go to the place where the body is, cause it to be exhumed if it has been interred, and summon not less than nine nor more than fifteen persons, qualified by law to serve as jurors, to appear before him forthwith, at the place where the body of deceased is, to inquire into the cause of the death.

Inquest.—A coroner holding an inquest, is in the performance of functions judicial in their character—44 Cal. 458. After inquisition found, a second inquest cannot be held until the first has been vacated, and a new inquiry ordered by the court—4 Parker Cr. R. 319. See Pol. Code, §§ 4286, 4290.

1511. When six or more of the jurors attend, they must be sworn by the coroner to inquire who the person was, and when, where, and by what means, he came to his death, and into the circumstances attending his death; and to render a true verdict thereon, according to the evidence offered them, or arising from the inspection of the body.

1512. Coroners may issue subpoenas for witnesses, returnable forthwith, or at such time and place as they may appoint, which may be served by any competent person. They must summon and examine as witnesses every person who, in their opinion, or that of any of the jury, has any knowledge of the facts, and may summon a surgeon or physician to inspect the body, and give a professional opinion as to the cause of the death.

1513. A witness served with a subpoena may be compelled to attend and testify, or punished by the coroner for disobedience, in like manner as upon a subpoena issued by a justice of the peace.

1514. After inspecting the body and hearing the testimony, the jury must render their verdict, and certify the same by an inquisition in writing, signed by them, and setting forth who the person killed is, and when, where, and by what means, he came to his death; and if he was killed, or his death occasioned by the act of another, by criminal means, who is guilty thereof.

1515. The testimony of the witnesses examined before the coroner's jury must be reduced to writing by the coroner, or under his direction, and forthwith filed by him, with the inquisition, in the office of the clerk of the Superior Court of the county. [In effect April 12th, 1880.]

1516. If, however, the person charged with the commission of the offense is arrested before the inquisition can be filed, the coroner must deliver the same, with the testimony taken, to the magistrate before whom such person may be brought, who must return the same, with the depositions and statement taken before him, to the office of the clerk of the Superior Court of the county. [In effect April 12th, 1880.]

1517. If the jury find that the person was killed by another, under circumstances not excusable or justifiable by law, or that his death was occasioned by the act of another by criminal means, and the party committing

the act is ascertained by the inquisition, and is not in custody, the coroner must issue a warrant, signed by him, with his name of office, into one or more counties, as may be necessary for the arrest of the person charged.

1518. The coroner's warrant must be in substantially the following form:

"COUNTY OF — .

"The People of the State of California to any sheriff, constable, marshal, or policeman in this State:

"An inquisition having been this day found by a coroner's jury before me, stating that A. B. has come to his death by the act of C. D., by criminal means, (or as the case may be, as found by the inquisition) you are therefore commanded forthwith to arrest the above named C. D. and take him before the nearest or most accessible magistrate in this county.

"Given under my hand this — day of —, A. D. eighteen —. E. F., Coroner of the county of —."

1519. The coroner's warrant may be served in any county, and the officer serving it must proceed thereon, in all respects, as upon a warrant of arrest on an information before a magistrate, except that when served in another county it need not be indorsed by a magistrate of that county.

CHAPTER III.

OF SEARCH-WARRANTS.

- § 1523. Search-warrant defined.
- § 1524. Upon what ground it may issue.
- § 1525. It cannot be issued but upon probable cause, etc.
- § 1526. Magistrates must examine, on oath, complainant, etc.
- § 1527. Depositions, what to contain.
- § 1528. When to issue warrant.
- § 1529. Form of warrant.
- § 1530. By whom served.
- § 1531. Officer may break open door, etc., to execute warrant.
- § 1532. May break open door, etc., to liberate person acting in his aid.
- § 1533. When warrant may be served in the night.
- § 1534. Within what time warrant must be executed.
- § 1535. Officer to give receipt for property taken.
- § 1536. Property, how disposed of.
- § 1537. Return of warrant and inventory of property taken.
- § 1538. Copy of inventory, to whom delivered.
- § 1539. Proceedings, if grounds of warrant are controverted.
- § 1540. Property, when to be restored.
- § 1541. Depositions, warrants, etc., to be returned by magistrate to County Court.
- § 1542. Search of defendant in presence of magistrate.

1523. A search-warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

1524. It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled; in which case it may be taken on the warrant, from any place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

2. When it was used as the means of committing a

felony; in which case it may be taken on the warrant from the place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered; in which case it may be taken on the warrant from such person, or from any place occupied by him or under his control, or from the possession of the person to whom he may have so delivered it.

1525. A search-warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.

1526. The magistrate must, before issuing the warrant, examine on oath the complainant, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

Oath.—A search-warrant may be issued on oath, where property has been secreted—1 Dowl. & R. 97. See *ante*, § 1524.

1527. The depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

1528. If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search-warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate.

1529. The warrant must be in substantially the following form:

"COUNTY OF —.

"*The People of the State of California to any sheriff, constable, marshal, or policeman in the county of —:*

"Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken), that (stating the grounds of the application, according to section one thousand five hundred and twenty-five, or if the affidavit be not positive, that there is probable cause for believing that (stating the ground of the application in the same manner), you are therefore commanded, in the day-time (or at any time of the day or night, as the case may be, according to section one thousand five hundred and thirty-three), to make immediate search on the person of C. D. (or in the house situated —, (describing it or any other place to be searched, with reasonable particularity, as the case may be) for the following property (describing it with reasonable particularity); and if you find the same or any part thereof, to bring it forthwith before me at (stating the place).

"Given under my hand, and dated this — day of —, A. D. eighteen —.

"E. F., Justice of the Peace" (or as the case may be).

Requisites of.—It should specify the place, the person, and the thing to be found—38 Me. 30; 47 N. H. 544; 2 Met. 329; 3 Allen, 310; 6 Id. 536; 2 Id. 52; 8 Gray, 539; 13 Id. 454; 1 Conn. 40; 2 Iowa, 165.

It must accurately specify the building to be searched—109 Mass. 73; id. 145; 62 Me. 420; 54 N. H. 164; see 2 Iowa, 165. If authority is given to search a specific building, no other can be searched—38 Me. 30; 41 Id. 254; id. 74; 44 Iowa, 399; 2 J. J. Marsh. 44; see 3 Allen, 310; nor can any other article than that specified be searched for, unless to substantiate proof of the felony—9 Dowl. & R. 224; 6 Barn. & C. 232.

1530. A search-warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

1531. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

Breaking and entering.—The house may be broken open to execute the warrant, in case of a felony, but admittance must first be asked and refused—120 Mass. 190. The keys ought to be first demanded—41 Me. 234.

1532. He may break open any outer or inner door or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

1533. The magistrate must insert a direction in the warrant that it be served in the day-time, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

1534. A search-warrant must be executed and returned to the magistrate who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void.

1535. When the officer takes property under the warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or in the absence of any person, he must leave it in the place where he found the property.

1536. When the property is delivered to the magistrate, he must, if it was stolen or embezzled, dispose of it as provided in sections one thousand four hundred and eight to one thousand four hundred and thirteen, inclusive. If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of section one thousand five hundred and twenty-four, he must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property taken is triable.

1537. The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken, made publicly or in the presence

of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory, and taken before the magistrate at the time, to the following effect: "I, R. S., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

1538. The magistrate must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

1539. If the grounds on which the warrant was issued be controverted, he must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated in the manner prescribed in section eight hundred and sixty-nine.

1540. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

1541. The magistrate must annex together the depositions, the search-warrant and return, and the inventory, and return them to the next term of the county court having power to inquire into the offenses in respect to which the search-warrant was issued, at or before its opening on the first day.

1542. When a person charged with a felony is supposed by the magistrate before whom he is brought to have on his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order, or to the order of the court in which the defendant may be tried.

CHAPTER IV

PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.

- § 1547. Rewards for the apprehension of fugitives from justice.
- § 1548. Fugitives from another State, when to be delivered up.
- § 1549. Magistrate to issue warrant.
- § 1550. Proceedings for the arrest and commitment of the person charged.
- § 1551. When and for what time to be committed.
- § 1552. His admission to bail.
- § 1553. Magistrate must notify district attorney of the arrest.
- § 1554. Duty of the district attorney.
- § 1555. Person arrested, when to be discharged.
- § 1556. Magistrate to return his proceedings to Superior Court.
- § 1557. Fugitives from this State—accounts.
- § 1558. No fee to be paid to public officer procuring surrender.

1547. The governor may offer a reward, not exceeding one thousand dollars, payable out of the general fund, for the apprehension—

1. Of any convict who has escaped from the State prison; or,
2. Of any person who has committed, or is charged with the commission of, an offense punishable with death.

1548. A person charged in any State of the United States with treason, felony, or other crime, who flees from justice and is found in this State, must, on demand of the executive authority of the State, from which he fled, be delivered up by the governor of this State, to be removed to the State having jurisdiction of the crime.

Demand for surrender.—To justify the arrest and delivery of the fugitive, it is necessary that the charge of criminality shall have been made in the State demanding him, in form of an indictment, information, affidavit, or other accusation known to the laws of the State—3 Iowa, 391; 56 N. Y. 182; 9 Wend. 219; 3 McLean, 121; 1 Sand. 701.

The process of extradition is only authorized upon demand of the executive of such other State, and where a criminal charge is actually pending against an alleged fugitive in the State making the demand—49 Cal. 434; 10 Serg. & R. 125; 56 N. Y. 182. It is not necessary that a

copy of the indictment should accompany the demand; it is sufficient if it is referred to in the writ—7 Ind. 471; 29 id. 10.

The requisition or proceeding must show that the alleged crime was committed within the jurisdiction of the State making the application—3 McLean, 121; and the charge must be positive, not on information or belief—id. The affidavit must show that the supposed culprit has fled from justice in one State, and has taken refuge, or is found, in another—3 McLean, 121; 13 West. Jur. 15. It is not necessary that the affidavit, upon which the requisition issued, should set forth the crime charged with all legal exactness—5 Cal. 237; nor that the prisoner is "a fugitive from justice"; that he committed the crime, and then secretly fled, is sufficient—5 Cal. 237.

When the requisition certifies that the affidavit is "duly authenticated according to the laws" of said State, it is sufficient—5 Cal. 237. The governor of a State issuing the requisition for the fugitive is the only proper judge of the authenticity of the affidavit—5 Cal. 237.

Interstate extradition.—Certain of the colonies, before the declaration of independence, pledged their faith to each other that on the escape of a fugitive from justice, the colony wherein he should be found should, upon the certificate of two magistrates of the jurisdiction from which he escaped, forthwith grant a warrant for his arrest, and deliver him into the hands of the officers, or other persons in pursuit of him—24 How. 66; id. 101; 10 Serg. & R. 129; 2 Winth. Hist. of Mass. 121, 126. And the thirteen colonies in the articles of confederation included a similar but more explicit provision for the extradition of criminals—24 How. 66; id. 102. Afterward, upon the adoption of the Constitution of the United States, the same provision was literally included therein, "high misdemeanor" being substituted for the word "crime," including every offense made punishable by the law of the State in which it was committed—id.; 43 Ind. 123. The provision of the Constitution of the United States rendered absolute the duty to surrender criminals by one State to another, which, before that, was entirely a matter of comity and in the discretion of the State authorities—24 How. 66; 16 Peters, 539; 14 id. 540; 17 Mass. 514; 10 Serg. & R. 125; 2 Brock. 493; 2 Sand. 482; 7 Am. Law Record, 212; 16 Wall. 366.

Offenses made punishable by the laws of the State where the act charged is committed, come within the meaning of the Constitutional provision—24 How. 66; 32 N. J. L. 141; Phill. N. C. 57; 1 Sand. 701; 31 Vt. 279; 112 Mass. 409; leaving no discretion with the State on which the demand is made—24 How. 66.

The provisions of the Constitution are not intended for the benefit of private persons, and may not be resorted to for the purpose of bringing a debtor within the jurisdiction—6 Wis. 42; 2 Sand. 717; 3 Paige, 314; 37 How. Pr. 235. The courts of the United States have full power and jurisdiction over cases of this nature—3 McLean, 121. Under the Constitution, the intercourse with foreign powers is vested exclusively in the United States government, and States have no authority to grant or cause the extradition of one of its citizens on demand of a foreign power—50 N. Y. 321; 14 Peters, 540; see 3 Wash. C. C. 546; 4 id. 556.

1549. A magistrate may issue a warrant for the apprehension of a person so charged, who flees from justice and is found in this State.

Warrant for arrest.—The proceeding must be such as is usual in similar charges against residents, and the warrant, indictment, and demand must specify the nature of the crime charged—49 Cal. 436; 10 Serg. & R. 125; 28 Ind. 450; 56 N. Y. 182.

The only authority as to the extradition of criminals, is derived from the national Constitution, and if the proceeding be not in conformity thereto, extradition cannot be enforced—49 Cal. 435; 3 McLean, 121; 28 Iowa, 391; 9 Wend. 212; 1 Sand. 701; 6 Wis. 45; 56 N. Y. 182; 9 Tex. 635; see 6 Peters, 761; 4 Wash. C. C. 371.

A person cannot be arrested, unless a prosecution has been commenced and is pending against him in the State having jurisdiction of the offense—49 Cal. 437.

A State law for the surrender of fugitives from justice, is not unconstitutional—49 Cal. 434; id. 436.

1550. The proceedings for the arrest and commitment of a person charged are, in all respects, similar to those provided in this Code for the arrest and commitment of a person charged with a public offense committed in this State, except that an exemplified copy of an indictment found, or other judicial proceedings had against him, in the State in which he is charged to have committed the offense, may be received as evidence before the magistrate.

Proceeding for arrest.—A State may provide for the arrest and detention of fugitives from justice before the requisition has arrived, and may accompany the act for the arrest by as many conditions as to the mode of arrest and examination as it sees fit, and such act must be strictly complied with—51 Cal. 287. An officer armed with civil process cannot take a person from the hands of another officer who holds him on a warrant issued on a criminal charge—51 Cal. 288.

The courts possess no power to control the executive discretion in surrendering fugitives from justice, yet, having acted, that discretion may be examined into in every case where the liberty of the subject is involved—5 Cal. 237. The sufficiency of the charges and regularity of the proceedings may be examined into on habeas corpus—5 Cal. 237; 56 N. Y. 182; 9 Tex. 635; 14 Abb. Pr. N. S. 323; 10 Wend. 636.

1551. If, from the examination, it appear that the accused has committed the crime alleged, the magistrate, by warrant reciting the accusation, must commit him to the proper custody in his county, for such time, to be specified in the warrant, as the magistrate may deem reasonable, to enable the arrest of the fugitive under the warrant of the executive of this State, on the requisition of the executive authority of the State in which he committed the offense, unless he gives bail as provided in the next section, or until he is legally discharged.

Commitment.—The law authorizing the arrest of a fugitive before a demand for his surrender, and his detention for a reasonable time to afford an opportunity for executive demand, is not in conflict with art. 4, § 2, of the Constitution of the United States—49 Cal. 437.

The State on which the demand is made is not bound to deliver up the offender until its own laws are satisfied—51 How. Pr. 422. One State cannot enforce the penal or criminal laws of another, or punish offenses against another State or sovereignty—10 Wheat. 66; id. 123; 14 Johns. 338; 3 Dutch. 499; 17 Mass. 515, 548; Tayl. (N. C.) 65; 14 Vt. 357; 4 Humph. 456.

1552. The magistrate may admit the person arrested to bail by an undertaking with sufficient securities, and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, and for his surrender to arrest upon the warrant of the governor of this State.

1553. Immediately upon the arrest of the person charged, the magistrate must give notice thereof to the district attorney of the county.

1554. The district attorney must immediately thereafter give notice to the executive authority of the State, or to the prosecuting attorney or presiding judge of the court of the city or county within the State having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

1555. The person arrested must be discharged from custody or bail, unless, before the expiration of the time designated in the warrant or undertaking, he is arrested under the warrant of the governor of this State.

Person, when discharged.—When a person is arrested before a demand for his surrender has been made, he is entitled to his discharge, if after his examination has commenced it is postponed against his consent for a longer period than that mentioned in § 861 of this Code—51 Cal. 288.

1556. The magistrate must return his proceedings to the Superior Court of the county, which must thereupon inquire into the cause of the arrest and detention of the person charged, and if he is in custody, or the time of his arrest has not elapsed, it may discharge him from detention, or may order his undertaking of bail to be canceled, or may continue his detention for a longer time, or readmit him to bail, to appear and surrender himself within a time specified in the undertaking. [In effect April 12th, 1880.]

1557. When the governor of this State, in the exercise of the authority conferred by section two, article four, of the Constitution of the United States, or by the laws of this State, demands from the executive authority of any State of the United States, or of any foreign government, the surrender to the authorities of this State of a fugitive from justice, who has been found and arrested in such State or foreign government, the accounts of the person employed by him to bring back such fugitive must be audited by the board of examiners, and paid out of the State treasury.

The fact that a fugitive from justice has not been heard from for sixteen months, and that he was a passenger on a particular vessel bound for a specified port, and that neither the vessel or crew had ever been heard from, is not sufficient to raise a legal presumption of his death—8 Cal. 65.

1558. No compensation, fee, or reward of any kind can be paid to or received by a public officer of this State, or other person, for a service rendered in procuring from the governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this State, or detaining him therein, except as provided for in such section.

CHAPTER V.

MISCELLANEOUS PROVISIONS RESPECTING SPECIAL PROCEEDINGS OF A CRIMINAL NATURE.

- § 1562. Parties to special proceedings, how designated.
- § 1563. Entitling affidavits.
- § 1564. Subpœnas.

1562. The party prosecuting a special proceeding of a criminal nature is designated in this Code as the complainant, and the adverse party as the defendant.

1563. The provisions of section one thousand four hundred and one, in respect to entitling affidavits, are applicable to such proceedings.

1564. The courts and magistrates before whom such proceedings are prosecuted, may issue subpœnas for witnesses, and punish their disobedience in the same manner as in a criminal action.

TITLE XIII.

Proceedings for bringing Persons imprisoned in the State Prison, or the Jail of another County, before a Court.

§ 1567. Persons imprisoned in another county, how brought before a court.

1567. When it is necessary to have a person imprisoned in the State prison brought before any court, or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court, and executed by the sheriff of the county where it is made.

TITLE XIV.

Disposition of Fines and Forfeitures.

§ 1570. Fines and forfeitures, how disposed of.

1570. All fines and forfeitures collected in any court, except Police Courts, must be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred; and after such costs are paid, the residue must be paid to the county treasurer of the county in which the court is held. [Approved March 30th, 1874; in effect July 1st, 1874.]

The meaning of §§ 240, 1457, and this section, construed together, is that for the crime of assault the defendant may be fined not exceeding five hundred dollars, and in addition be adjudged to pay the costs of the proceeding; and the payment of the fine, but not of the costs, may be enforced by imprisonment—45 Cal. 146.

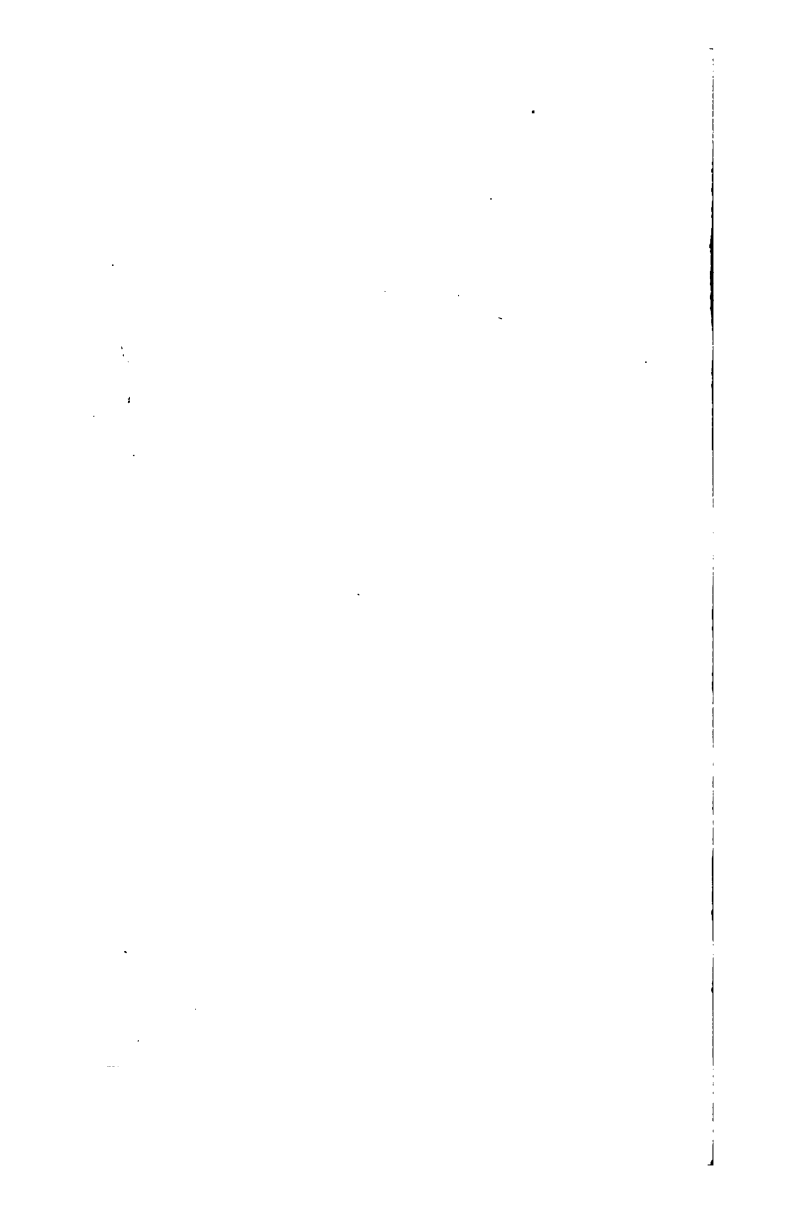


PART III.

THE STATE PRISON AND COUNTY JAILS.

(§§ 1573-1614.)

[609]



TITLE I.

Of the State Prison and the Discharge of Prisoners therefrom before their Term of Service expires.

CHAP. I. OF THE STATE PRISON, §§ 1573-87.

II. OF THE DISCHARGE OF PRISONERS BEFORE THE
EXPIRATION OF THEIR TERM OF SERVICE.
§§ 1590-5.

CHAPTER I.

OF THE STATE PRISON.

- § 1573. Under the charge and control of a board of directors.
- § 1574. President *pro tem* of Senate, when to act as director.
- § 1575. Compensation of directors.
- § 1576. Board must adopt rules and regulations.
- § 1577. Board may appoint warden and other officers.
- § 1578. Duties of clerk and other officers.
- § 1579. Monthly reports of officers.
- § 1580. Board must keep accounts and report to the governor.
- § 1581. Persons convicted of offenses against the United States.
- § 1582. Disposition of insane prisoners.
- § 1583. State prison fund.
- § 1584. State prison fund, how disbursed.
- § 1585. Board cannot contract debts.
- § 1586. Compensation for transportation of convicts.
- § 1587. Contract to be given at public letting.

1573. The State prison is under the charge, control, and superintendence of a board of directors, consisting of a governor, lieutenant governor, and secretary of state.

1574. In case of a vacancy in the office of lieutenant governor, the president *pro tem.* of the Senate may perform the duties and receive the compensation provided for the lieutenant governor.

1575. The board of directors are to receive the sum of seventy-five dollars per month each, for expenses incurred by them; in addition to which the lieutenant governor is paid the sum of ten dollars per day for each day's services rendered in the performance of any duty at the prison.

1576. The board must adopt rules and regulations for the discipline of prisoners and the government of the

prison, which rules must be printed, and copies thereof furnished to every officer appointed by the board.

1577. The board may appoint a warden, clerk, and such other officers as may be necessary for the management and safe-keeping of the prisoners.

1578. The clerk must keep a record of the transactions of the board, and he and the warden and other officers appointed must perform such other duties as are required by the board, or the rules and regulations adopted thereby.

1579. The warden and other officers appointed must make a monthly report to the board, which must contain a statement of business done and transactions had in their several departments.

1580. The board must keep correct accounts of all funds received from proceeds of convict labor, and appropriate such funds to the maintenance of the convicts and to the payment of prison expenses, and must make a full report to the governor on the first Monday of each August next before the assembling of the Legislature, which report must contain a complete statement of the number and condition of the prisoners at the prison; the number and character of officers they have appointed, and the monthly pay received by each; the amount of expenses incurred, and for what; the amount and condition of personal property, belonging to the State, connected with the State prison; and the actual condition of the buildings and property.

1581. The authorities of the State prison must receive into the prison any person convicted of an offense against the United States, and keep such person in solitary confinement or at hard labor, or in confinement with or without hard labor, as provided in the order of the court pronouncing sentence, until legally discharged, the United States supporting such convict, and paying the expenses of the execution of his sentence.

1582. When the physician, warden, and captain of the yard of the State prison, after an examination, are of opinion that any prisoner is insane, they must certify the fact under oath to the governor, who may, in his discretion, order the removal of such prisoner to the insane asylum. As soon as the authorities of the asylum ascertain that such person is not insane, they must immediately notify the warden of that fact, and thereupon the warden must cause such prisoner to be at once returned to the prison, if his term of imprisonment has not expired.

1583. The moneys appropriated by the Legislature and the proceeds of the labor of prisoners constitute the State prison fund.

1584. The moneys in the State prison fund are applicable to the payment of the expenses of the prison, and the salaries of the directors and officers thereof. The expenses and salaries must be audited and allowed by a board of examiners of State prison accounts, consisting of the attorney-general, treasurer, and controller; after which, upon the order of the board of directors, the controller must draw his warrant on the treasurer therefor, and the treasurer must pay the same out of such fund.

1585. The board of directors cannot contract any debt or incur any liability binding upon the State.

1586. Sheriffs delivering prisoners at the State prison must receive all expenses necessarily incurred in their transportation, and also a just and reasonable compensation for their own services, the amount of the expenses and compensation in each case to be audited and allowed by the board of examiners and paid out of any moneys in the State treasury appropriated for that purpose, and no further compensation shall be received by sheriffs for such transportation or services. [In effect April 9th, 1890.]

1587. The board of directors are hereby authorized and required to contract for provisions, clothing, medi-

unes, forage, fuel, and other supplies for the prison, for any period of time not exceeding one year; and such contract shall be given to the lowest bidder, at a public letting thereof, if the price bid is a fair and reasonable one, and not greater than the usual market value and price. Each bid shall be accompanied by a bond, in such penal sum as said board shall determine, with good and sufficient sureties, conditioned for the faithful performance of the terms of such contract. Notice of the time, place, and conditions of letting of each contract shall be given, for at least four consecutive weeks, in two daily newspapers in the cities of San Francisco and Sacramento; and also four insertions in a weekly paper published in the county in which the prison is situated. If all the bids made at such letting are deemed unreasonably high, the board may, in their discretion, decline to contract, and may again advertise for proposals, and may so continue to renew the advertisement until satisfactory contracts may be had; and in the meantime the board may contract with any one whose offer may be regarded just and proper; but no contract thus made shall be let to run more than sixty days, or shall in any case extend beyond the public letting. No bids shall be accepted and a contract entered into in pursuance thereof, when such bid is higher than any other bid made at the same letting for the same article, and where a contract can be had at such lower bid. When two or more bids for the same article are equal in amount, the board may select the one which, all things considered, may by them be thought best for the interest of the State, or may divide the contract between the bidders, as in their discretion may seem proper and right; *provided*, no contract shall be given, or purchase made, where either of the board, or any of the officers of the prison, is interested. All contracts or purchases made in violation of this section shall be void. [Approved Feb. 24th, 1874.]

CHAPTER II.

OF THE DISCHARGE OF PRISONERS BEFORE THE EXPIRATION
OF THEIR TERM OF SERVICE.

- § 1590. Credits for good behavior, how and when allowed.
- § 1591. Credits, when forfeited.
- § 1592. Board to make rules and regulations.
- § 1593. Board, when to report credits to governor.
- § 1594. Further powers of the board.
- § 1595. Recommendations for pardon reported to Legislature.

1590. The board of State prison directors of this State shall require of every able-bodied convict confined in said prison as many hours of faithful labor, in each and every day during his term of imprisonment, as shall be prescribed by the rules and regulations of the prison, and every convict faithfully performing such labor, and being in all respects obedient to the rules and regulations of the prison, or if unable to work, yet faithful and obedient, shall be allowed from his term, instead and in lieu of the commutation heretofore allowed by law, a deduction of two months in each of the first two years, four months in each of the next two years, and five months in each of the remaining years of said term; *provided*, that any such convict who shall commit an assault upon his keeper, or any foreman, officer, or convict, or otherwise endanger life, or by any flagrant disregard of the rules of the prison, or any misdemeanor whatever, shall forfeit all deductions of time earned by him for good conduct before the commission of such offense; such forfeiture, however, shall only be made by the board of directors, after due proof of the offense, and notice to the offender; nor shall such forfeiture be imposed when a party has violated any rule or rules without violence or evil intent, of which the directors shall be the sole judges. The name of no con-

vict who attempts to escape, after the passage of this act, shall be sent by the State prison officials to the governor for the commutation herein provided; *provided further*, that of those prisoners entitled to their discharge at the date of the passage of this act, by virtue of the provisions hereof, not more than one shall be discharged on any one day, and the discharges shall be made in the order in which they would have occurred if this act had been passed April, eighteen hundred and sixty-four. [Approved March 29th, in effect April 15th, 1878.]

Deduction from term of service.—When a party is sentenced to two terms, the credits must not be deducted from the first term, but from the end of the entire term included in both sentences. The entire period of both is but one term—49 Cal. 465.

1591. The rule of commutation fixed in the preceding section is to be so applied as that any refusal to labor, a breach of the prison rules, or other misconduct, works a forfeiture of the credits of time thus earned, or such part of it as the warden or resident director may determine, subject to confirmation or rejection by the board of directors, on appeal by the prisoner. Unless the board, on appeal, at its first session thereafter, rejects the forfeiture, it is confirmed. Credits once forfeited cannot be restored except by the board, and then only when circumstances render such restoration urgently necessary. The above provisions apply to all persons now imprisoned in the State prison, and the commutation must be computed from April fourth, A. D. eighteen hundred and sixty-four.

1592. The board may make such rules and regulations as may be necessary to carry into effect the provisions of this chapter, and may declare and establish a proper scale or rate of debits and credits for good conduct or misconduct, which shall accompany the rules of discipline of the prison, and, in a book to be kept for that purpose, must cause to be entered up, at the end of each month, the result of credits to which each prisoner may be entitled, and on the first day of each month announce such result

to the prisoners. Every contractor employing convict labor must keep a similar record of the conduct of all prisoners employed by him, and submit the same for inspection to the board at the end of each month, who must take the same into consideration in making up their decision.

1593. At the end of every month the board must report to the governor of this State the names of all prisoners whose terms of imprisonment are about to expire by reason of the benefits of this chapter, giving in such report the terms of their sentences, the date of imprisonment, the amount of total credits to the date of such report, and the date when their service would expire by limitation of sentence. The governor, at the expiration of the term for which any prisoner has been sentenced, less the number of days allowed and credited to him, must order the release of such prisoner, by an order under his hand addressed to the warden of the prison, in such mode and form as he may deem proper, and with or without restoration to citizenship, according in his discretion.

1594. The board must grant and enter up in favor of such prisoners whom they may deem worthy, by reason of good conduct and industry, during the twelve months prior to the fourth day of April, A. D. eighteen hundred and sixty-four, the credits authorized by section one thousand five hundred and ninety, not exceeding thirty days, the same to be deducted from the term of their imprisonment.

1595. The board must report to the Legislature, at each regular session, the names of any persons confined in the State prison, who, in their judgment, ought to be pardoned and set at liberty on account of good conduct or unusual terms of sentence, or any other cause which, in their opinion, should entitle such prisoners to a pardon. Whenever the Legislature, by a majority of both houses, recommend to the governor that any or all of the persons reported be pardoned by him, he may thereupon pardon such prisoners.

TITLE II.

Of County Jails.

- § 1597. County jails, by whom kept and for what used.
- § 1598. Rooms required in county jails.
- § 1599. Prisoners to be classified.
- § 1600. Prisoners committed must be actually confined.
- § 1601. Sheriff to receive prisoners committed by courts.
- § 1602. Sheriff answerable for safe-keeping of such prisoners.
- § 1603. When jail of a contiguous county may be used.
- § 1604. Keeper of jail in contiguous county to receive prisoners.
- § 1605. When jail in contiguous county to cease to be used.
- § 1606. Prisoners to be returned to proper county.
- § 1607. Prisoners may be removed in case of fire.
- § 1608. Prisoners may be removed in case of pestilence.
- § 1609. Papers served on jailer for prisoner.
- § 1610. Guard for jail.
- § 1611. Sheriff to receive all persons duly committed.
- § 1612. Prisoners on civil process, when not to be received.
- § 1613. Prisoners may be required to labor.
- § 1614. Rules and regulations for the performance of labor.

1597. The common jails in the several counties of this State are kept by the sheriffs of the counties in which they are respectively situated, and are used as follows:

1. For the detention of persons committed in order to secure their attendance as witnesses in criminal cases.
2. For the detention of persons charged with crime and committed for trial.
3. For the confinement of persons committed for contempt, or upon civil process, or by other authority of law.
4. For the confinement of persons sentenced to imprisonment therein upon a conviction for crime.

1598. Each county jail must contain a sufficient number of rooms to allow all persons belonging to either one of the following classes to be confined separately and

distinctly from persons belonging to either of the other classes:

1. Persons committed on criminal process and detained for trial.
2. Persons already convicted of crime and held under sentence.
3. Persons detained as witnesses or held under civil process, or under an order imposing punishment for a contempt.
4. Males separately from females.

1599. Persons committed on criminal process and detained for trial, persons convicted and under sentence, and persons committed upon civil process, must not be kept or put in the same room, nor shall male and female prisoners (except husband and wife) be kept or put in the same room.

1600. A prisoner committed to the county jail for trial or for examination, or upon conviction for a public offense, must be actually confined in the jail until he is legally discharged, and if he is permitted to go at large out of the jail, except by virtue of a legal order or process, it is an escape.

1601. The sheriff must receive, and keep in the county jail, any prisoner committed thereto by process or order issued under the authority of the United States, until he is discharged according to law, as if he had been committed under process issued under the authority of this State; provision being made by the United States for the support of such prisoner.

1602. A sheriff, to whose custody a prisoner is committed, as provided in the last section, is answerable for his safe-keeping in the courts of the United States, according to the laws thereof.

1603. When there is no jail in the county, or when the jail becomes unfit or unsafe for the confinement of pris-

oners, the county judge may, by a written appointment filed with the county clerk, designate the jail of a contiguous county for the confinement of the prisoners of his county, or of any of them, and may at any time modify or annul the appointment.

1604. A copy of the appointment, certified by the county clerk, must be served on the sheriff or keeper of the jail designated, who must receive into his jail all prisoners authorized to be confined therein, pursuant to the last section, and who is responsible for the safe-keeping of the persons so committed, in the same manner and to the same extent as if he was sheriff of the county for whose use his jail is designated, and with respect to the persons so committed he is deemed the sheriff of the county from which they were removed.

1605. When a jail is erected in the county for the use of which the designation was made, or its jail is rendered fit and safe for the confinement of prisoners, the county judge of that county must, by a written revocation, filed with the county clerk thereof, declare that the necessity for the designation has ceased, and that it is revoked.

1606. The county clerk must immediately serve a copy of the revocation upon the sheriff of the county, who must thereupon remove the prisoners to the jail of the county from which the removal was had.

1607. When a county jail or a building contiguous to it is on fire, and there is reason to apprehend that the prisoners may be injured or endangered, the sheriff or jailer must remove them to a safe and convenient place, and there confine them as long as it may be necessary to avoid the danger.

1608. When a pestilence or contagious disease breaks out in or near a jail, and the physician thereof certifies that it is liable to endanger the health of the prisoners, the county judge may, by a written appointment, design-

nate a safe and convenient place in the county, or the jail in a contiguous county, as the place of their confinement. The appointment must be filed in the office of the county clerk, and authorize the sheriff to remove the prisoners to the place or jail designated, and there confine them until they can be safely returned to the jail from which they were taken.

1609. A sheriff or jailer upon whom a paper in a judicial proceeding, directed to a prisoner in his custody, is served, must forthwith deliver it to the prisoner, with a note thereon of the time of its service. For a neglect to do so he is liable to the prisoner for all damages occasioned thereby.

1610. The sheriff, when necessary, may, with the assent in writing of the county judge, or in a city, of the mayor thereof, employ a temporary guard for the protection of the county jail, or for the safe keeping of prisoners, the expenses of which are a county charge.

1611. The sheriff must receive all persons committed to jail by competent authority, and provide them with necessary food, clothing, and bedding, for which he shall be allowed a reasonable compensation, to be determined by the board of supervisors, and, except as provided in the next section, to be paid out of the county treasury.

1612. Whenever a person is committed upon process in a civil action or proceeding, except when the people of this State are a party thereto, the sheriff is not bound to receive such person, unless security is given on the part of the party at whose instance the process is issued, by a deposit of money to meet the expenses for him of necessary food, clothing and bedding, or to detain such person any longer than these expenses are provided for. This section does not apply to cases where a party is committed as a punishment for disobedience to the mandates, process, writs, or orders of court.

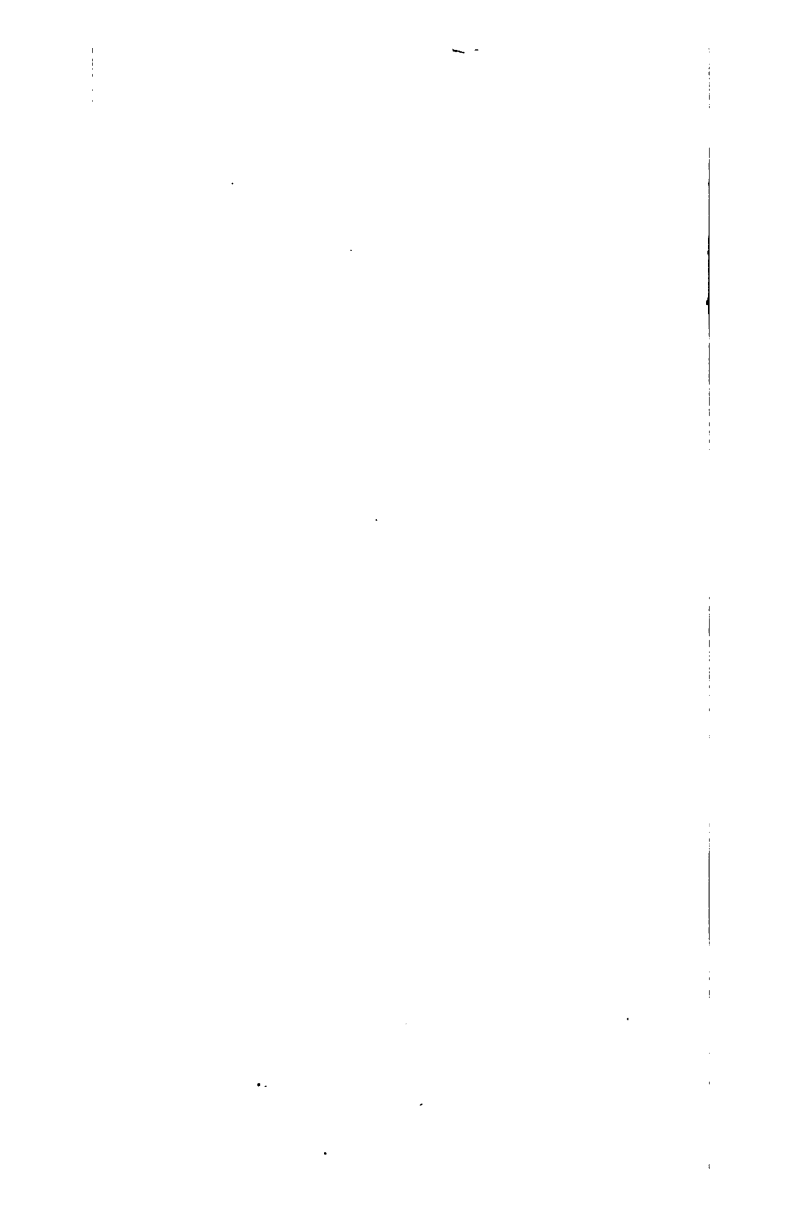
1613. Persons confined in the county jail under a judgment of imprisonment rendered in a criminal action or proceeding, may be required by an order of the board of supervisors to perform labor on the public works or ways in the county.

1614. The board of supervisors making such order may prescribe and enforce the rules and regulations under which such labor is to be performed.

Approved February 14th, 1872.

NEWTON BOOTH,

Governor.



PROVISIONS
OF THE
CODE OF CIVIL PROCEDURE
RELATING TO
JURIES AND EVIDENCE.

PEN. CODE.—43.

[625]

CHAPTER I.

JURORS.

ARTICLE I. JURORS IN GENERAL.

- II. QUALIFICATIONS AND EXEMPTIONS OF JURORS.
- III. OF SELECTING AND RETURNING JURORS FOR COURTS OF RECORD.
- IV. OF DRAWING JURORS FOR COURTS OF RECORD.
- V. OF SUMMONING JURORS FOR COURTS OF RECORD.
- VI. OF SUMMONING JURORS FOR COURTS NOT OF RECORD.
- VII. OF SUMMONING JURORS OF INQUEST.
- VIII. OBEDIENCE TO SUMMONS, HOW ENFORCED.
- IX. OF IMPANNELED GRAND JURIES.
- X. OF IMPANNELED TRIAL JURIES IN COURTS OF RECORD.
- XI. OF IMPANNELED TRIAL JURIES IN COURTS NOT OF RECORD.
- XII. OF IMPANNELED JURIES OF INQUEST.

ARTICLE I.

JURORS IN GENERAL.

- § 190. Jury defined.
- § 191. Different kinds of juries.
- § 192. Grand jury defined.
- § 193. Trial jury defined.
- § 194. Number of a trial jury.
- § 195. Jury of inquest defined.

§ 190. A jury is a body of men temporarily selected from the citizens of a particular district, and invested with power to present or indict a person for a public offense, or to try a question of fact.

Jurors—qualifications and exemptions, secs. 198-202; selecting and summoning, secs. 204-238; impanneled, secs. 241-254.

§ 191. Juries are of three kinds:

1. Grand juries;
2. Trial juries;
3. Juries of inquest.

§ 192. A grand jury is a body of men, nineteen in number, returned in pursuance of law, from the citizens of a county, or city and county, before a court of competent jurisdiction, and sworn to inquire of public offense committed or triable within the county, or city and county.

Grand jury, impanneled—secs. 241-242. How often drawn—Const. Cal. art. 1, sec. 8.

§ 193. A trial jury is a body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine, by verdict, a question of fact.

Trial by jury—secs. 600-619.

Verdict—when need not be unanimous, Const. Cal. art. 1, sec. 7. See also, sec. 618.

§ 194. A trial jury shall consist of twelve men; *provided*, that in civil actions and cases of misdemeanor, it may consist of twelve, or of any number less than twelve, upon which the parties may agree in open court.

Less than twelve—Const. Cal. art. 1, sec. 7; and see 18 Cal. 410.

§ 195. A jury of inquest is a body of men summoned from the citizens of a particular district before the Sheriff, Coroner, or other ministerial officer, to inquire of particular facts.

ARTICLE II.

QUALIFICATIONS AND EXEMPTIONS OF JURORS.

§ 198. Who competent to act as juror.

§ 199. Who not competent to act as juror.

§ 200. Who exempt from jury duty.

§ 201. Who may be excused.

§ 202. Affidavit of claim to exemption.

§ 198. A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years, who shall have been a resident of the State one year, and of the county, or city and county, ninety days before being selected and returned;

2. In possession of his natural faculties, and of ordinary intelligence, and not decrepit;

3. Possessed of sufficient knowledge of the English language;

4. Assessed on the last assessment-roll of the county, or city and county, on property belonging to him.

SUBDIVISION 1. Aliens—not competent, 17 Cal. 322; 51 Cal. 599.

Residence, generally—see Const. Cal. art. 2, sec. 4, art. 20, sec. 12; Political Code, sec. 52; 4 Cal. 175; 6 Cal. 410; 7 Cal. 91; 15 Cal. 48; 26 Cal. 162; 31 Cal. 261, 650.

Elector—juror formerly had to be—3 Cal. 108.

SUBDIVISION 3. 32 Cal. 40.

SUBDIVISION 4. 34 Cal. 672.

§ 199. A person is not competent to act as a juror:

1. Who does not possess the qualifications prescribed by the preceding section; or,

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2. Who has been convicted of malfeasance in office, or any felony or other high crime.

200. A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, or military officer of the United States, or of this State;
2. A person holding a county, city and county, or township office;
3. An attorney-at-law;
4. A minister of the gospel, or a priest of any denomination, following his profession;
5. A teacher in a university, college, academy, or school;
6. A practicing physician, or druggist, actually engaged in the business of dispensing medicines;
7. An officer, keeper, or attendant of an alms-house, hospital, asylum, or other charitable institution;
8. Engaged in the performance of duty as officer or attendant of the State Prison, or of a county jail;
9. Employed on board of a vessel navigating the waters of this State;
10. An express agent, mail-carrier, superintendent, employé, or operator of a telegraph line doing a general telegraph business in the State, or keeper of a public ferry or toll-gate.
11. An active member of the National Guard of California, or an active member of a fire department of any city and county, city, town, or village in this State, or an exempt member of a duly organized fire company who had become exempt from jury duty before the passage of this act;
12. A superintendent, engineer, or conductor on a railroad; or,
13. A person drawn as a juror in any court of record in this State, upon a regular panel, who has served as such within a year; but this exemption shall not extend to a person who is summoned as a juror for the trial of a particular case.

Exemption—how claimed, sec. 202.

SUBDIVISION 11—Exempt fireman—Political Code, secs. 3339, 3340.

§ 201. A juror shall not be excused by a court for slight or trivial cause, or for hardship or inconvenience to his business, but only when material injury or destruction to his property, or of property intrusted to him, is threatened, or when his own health, or the sickness or death of a member of his family, requires his absence.

§ 202. If a person, exempt from liability to act as a juror, as provided in section two hundred, be summoned as a juror, he may make and transmit his affidavit to the clerk of the court for which he is summoned, stating his office, occupation, or employment; and such affidavit shall be delivered by the Clerk to the Judge of the court where the name of such person is called, and if sufficient in substance, shall be received as an excuse for non-attendance in person. The affidavit shall then be filed by the Clerk.

ARTICLE III.

OF SELECTING AND RETURNING JURORS FOR COURTS OF RECORD.

- § 204. Jury lists, by whom and when to be made.
- 205. How selection shall be made.
- 206. Lists to contain how many names.
- 208. Lists to be placed with Clerk.
- 209. Duty of Clerk; jury boxes.
- 210. Regular jurors to serve one year.
- 211. Jurors to be drawn from boxes.

§ 204. Within thirty days after the passage of this act the Superior Court in each of the counties of this State shall make an order designating the number of grand jurors, and also the number of trial jurors that, in the opinion of said court, will be required for the transaction of the business of said court during the year ending on the first day of January, eighteen hundred and eighty-one; and thereafter, in the month of January in each year, it shall be the duty of said court to make an order designating the estimated number of grand jurors, and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court, and the court and the trial of causes therein, during the ensuing year. And immediately after said order shall be made, the Board of Supervisors shall select, as provided in the next section, a list of persons to serve as grand jurors and trial jurors in the Superior Court of said county during the ensuing year, or until a new list of jurors shall be provided. In cities and counties having over one hundred thousand inhabitants such selection shall be made by the Judges of the Superior Court.

§ 205. They shall proceed to select and list from those assessed on the last preceding assessment roll of such county, or city and county, suitable persons competent to serve as jurors; and in making such selection they shall take the names of such only as are not exempt from

serving, who are in possession of their natural faculties and not infirm or decrepit, of fair character, of approved integrity, and of sound judgment.

See sec. 198-201.

§ 206. The list to be made shall contain the number of persons which shall have been designated by the court. The names for such list shall be selected from the different wards or townships of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making such list.

§ 208. Certified lists of the persons selected to serve as jurors shall at once be placed in the possession of the County Clerk

§ 209. On receiving such lists, the County Clerk shall file the same in his office and write down the names contained thereon on separate pieces of paper of the same size and appearance, and fold each piece so as to conceal the name thereon. He shall deposit the pieces of paper having on them the names of the persons selected in a box, to be called the "jury box."

§ 210. The persons whose names are so returned shall be known as regular jurors, and shall serve for one year and until other persons are selected and returned.

§ 211. The names of persons, whether for grand or trial jurors, shall be drawn from the "jury box;" and if, at the end of the year, there shall be the names of persons in the "jury box" who may not have been drawn during the year to serve as jurors, the names of such persons may be placed upon the list of jurors drawn for the succeeding year.

ARTICLE IV.

OF DRAWING JURORS FOR COURTS OF RECORD.

- 214. Order of Judge or judges for drawing of jury.
- 215. Sheriff to be notified.
- 216. Sheriff and Judge to witness drawing.
- 217. Drawing, when to be adjourned.
- 218. Adjourned drawing to proceed, when.
- 219. Drawing, how conducted.
- 220. Preservation of ballots drawn.
- 221. Copy of list to be furnished by Clerk, when.

§ 214. Whenever the business of the Superior Court shall require the attendance of a trial jury for the trial of criminal cases, or where a trial jury shall have been de-

manded in any cause or causes at issue in said court, and no jury is in attendance, the court may make an order directing a trial jury to be drawn, and summoned to attend before said court. Such order shall specify the number of jurors to be drawn, and the time at which the jurors are required to attend. And the court may direct that such causes, either criminal or civil, in which a jury may be required, or in which a jury may have been demanded, be continued and fixed for trial when a jury shall be in attendance.

Superior Courts—secs. 65-79.

§ 215. Immediately upon the order mentioned in the preceding section being made, the Clerk shall, in the presence of the court, proceed to draw the jurors from the "jury box."

Presence of the court—*People v. Gallagher*, May 14th, 1880.

§ 219. The Clerk must conduct said drawing as follows:

1. He must shake the box containing the names of jurors so as to mix the slips of paper upon which such names are written as well as possible; he must then draw from the box as many slips of paper as are ordered by the court.

2. A minute of the drawing shall be entered in the minutes of the court, which must show the name contained on every slip of paper so drawn from the "jury box."

3. If the name of any person is drawn from the box who is deceased or insane, or who may have permanently removed from the county, or who is exempt from jury service, and the fact shall be made to appear to the satisfaction of the court, the name of such person shall be omitted from the list, and the slip of paper containing such name be destroyed and another juror drawn in his place, and the fact shall be entered upon the minutes of the court. The same proceeding shall be had as often as may be necessary until the whole number of jurors required are drawn.

After the drawing shall be completed, the Clerk shall make a copy of the list of names of the persons so drawn, and certify the same. In his certificate he shall state the date of the order and of the drawing, and the number of jurors drawn, and the time when and the place where such jurors are required to appear. Such certificate and list shall be delivered to the Sheriff for service.

§ 220. After a drawing of persons to serve as jurors, the Clerk shall preserve the ballots drawn, and at the close of the session or sessions for which the drawing was

had, he shall replace in the proper box from which they were taken all ballots which have on them the names of persons who did not serve as jurors for the session or sessions aforesaid, and who are not exempt or incompetent.

ARTICLE V.

OF SUMMONING JURORS FOR COURTS OF RECORD.

- § 225. Sheriff to summon jurors, how.
- 226. Of drawing and summoning jurors to attend forthwith.
- 227. Of summoning jurors to complete a panel.
- 228. Compensation of elisor.

§ 225. The Sheriff, as soon as he receives the list or lists of jurors drawn, shall summon the persons named therein to attend the court at the opening of the regular session thereof, or at such session or time as the court may order, by giving personal notice to that effect to each of them, or by leaving a written notice to that effect at his place of residence, with some person of proper age, and shall return the list to the court at the opening of the regular session thereof, or at such session or time as the jurors may be ordered to attend, specifying the names of those who were summoned, and the manner in which each person was notified.

Objection to juror—name not on venire, 9 Cal. 537.

Return—time for, is directory merely, 4 Cal. 275.

§ 226. Whenever jurors are not drawn or summoned to attend any court of record or session thereof, or a sufficient number of jurors fail to appear, such court may order a sufficient number to be forthwith drawn and summoned to attend the court, or it may, by an order entered in its minutes, direct the Sheriff, or an elisor chosen by the court, forthwith to summon so many good and lawful men of the county, or city and county, to serve as jurors, as may be required, and in either case such jurors must be summoned in the manner provided in the preceding section.

Special jury—4 Cal. 218; 43 Cal. 344; 46 Cal. 47; 47 Cal. 93, 134; *People v. Ah Chung*, May 22nd, 1880.

Elisor—14 Cal. 123.

§ 227. When there are not competent jurors enough present to form a panel the court may direct the Sheriff, or an elisor chosen by the court, to summon a sufficient number of persons having the qualifications of jurors to complete the panel, from the body of the county, or city and county, and not from the bystanders; and the Sheriff

or elisor shall summon the number so ordered accordingly and return the names to the court.

§ 228. An elisor who shall, by order of a court of record, summon persons to serve as jurors, shall be entitled to a reasonable compensation for his services, which must be fixed by the court and paid out of the county or city and county treasury, and out of the general fund thereof.

ARTICLE VI.

OF SUMMONING JURORS FOR COURTS NOT OF RECORD

§ 230. Jurors for Justices' or Police Courts.

§ 231. How to be summoned.

§ 232. Officer's return.

§ 230. When jurors are required in any of the Justices' Courts, or in any Police or other inferior court, they shall, upon the order of the Justice, or any one of the justices where there is more than one, or of the Judge thereof, be summoned by the Sheriff, constable, marshal, or policeman of the jurisdiction.

§ 231. Such jurors must be summoned from the persons competent to serve as jurors, residents of the city and county, township, city, or town in which such court has jurisdiction, by notifying them orally that they are summoned, and of the time and place at which their attendance is required.

§ 232. The officer summoning such jurors shall, at the time fixed in the order for their appearance, return it to the court with a list of the persons summoned indorsed thereon.

ARTICLE VII.

OF SUMMONING JURIES OF INQUEST.

§ 235. How to be summoned.

§ 235. Juries of inquest shall be summoned by the officer before whom the proceedings in which they are to sit are to be had, or by any Sheriff, constable, or policeman, from the persons competent to serve as jurors, resident of the county, or city and county, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

ARTICLE VIII.

OBEDIENCE TO SUMMONS, HOW ENFORCED.

§ 238. Attachment and fine.

§ 238. Any juror summoned, who willfully and without reasonable excuse fails to attend, may be attached and compelled to attend; and the court may also impose a fine not exceeding fifty dollars, upon which execution may issue. If the juror was not personally served, the fine must not be imposed until upon an order to show cause an opportunity has been offered the juror to be heard.

ARTICLE IX.

OF IMPANNELED GRAND JURIES.

§ 241. Grand jury, when to be impaneled.

§ 242. How constituted.

§ 243. Manner of impanneling prescribed in Penal Code.

§ 241. Every Superior Court, whenever, in the opinion of the court, the public interests may require it, must make and file with the County Clerk of their respective counties an order directing a jury to be drawn, and designating the number, which, in case of a grand jury, shall not be less than twenty-five, nor more than thirty. In all counties having less than three Superior Judges, there shall be one grand jury drawn and impaneled in each year, and in all counties having three or more Superior Judges, there shall be two grand juries drawn and impaneled in each year. Such order must designate the time at which the drawing will take place. The names of such jurors shall be drawn, the list of names certified and summoned as provided for drawing and summoning trial jurors, and the names of any persons drawn, who may not be impaneled upon the grand jury, may be again placed in the "jury box."

Const. Cal. art. 1, sec. 8.

§ 242. When, of the persons summoned as grand jurors and not excused, nineteen are present, they shall constitute the grand jury. If more than nineteen of such persons are present, the Clerk shall write their names on separate ballots, which he must fold so that the names cannot be seen, place them in a box, and draw out nineteen of them, and the persons whose names are on the ballots so drawn shall constitute the grand jury. If less than

nineteen of such persons are present, the panel may be filled as provided in section two hundred and twenty-six of this Code. And whenever, of the persons summoned to complete a grand jury, more shall attend than are required, the requisite number shall be obtained by writing the names of those summoned and not excused on ballots, depositing them in a box, and drawing as above provided.

Special grand jury—47 Cal. 135.

§ 243. Thereafter such proceedings shall be had in impanneling the grand jury as are prescribed in part two of the Penal Code.

See Penal Code, secs. 894-901.

ARTICLE X.

OF IMPANNELED TRIAL JURIES IN COURTS OF RECORD.

§ 246. Clerk to call list of jurors summoned.

§ 247. Manner of impanneling prescribed in part two.

§ 246. At the opening of court on the day trial jurors have been summoned to appear, the Clerk shall call the names of those summoned, and the court may then hear the excuses of jurors summoned. The Clerk shall then write the names of the jurors present and not excused, upon separate slips or ballots of paper, and fold such slips so that the names are concealed, and there, in the presence of the court, deposit the slips or ballots in a box, which must be kept sealed or locked until ordered by the court to be opened.

§ 247. Whenever thereafter a civil action is called by the court for trial, and a jury is required, such proceedings shall be had in impanneling the trial jury as are prescribed in part two of this Code. If the action be a criminal one, the jury shall be impaneled as prescribed in the Penal Code.

Civil action—see secs. 600-604.

Criminal case—see Penal Code, secs. 1055-1088.

ARTICLE XI.

OF IMPANNELED TRIAL JURIES IN COURTS NOT OF RECORD.

§ 250. Proceedings in forming jury.

§ 251. Manner of impanneling.

§ 250. At the time appointed for a jury trial in Justices', Police or other inferior courts, the list of jurors summoned must be called, and the names of those at-

tending and not excused must be written upon separate slips of paper, folded so as to conceal the names, and placed in a box, from which the trial jury must be drawn.

§ 251. Thereafter, if the action is a criminal one, the jury must be impaneled as provided in the Penal Code; if a civil one, as provided in part two of this Code.

See sec. 247.

ARTICLE XII.

OF IMPANNELED JURIES OF INQUEST.

§ 254. Manner of impanneled.

§ 254. The manner of impanneled juries of inquest is prescribed in the provisions of the different codes relating to such inquests.

CHAPTER IV.

TRIAL BY JURY.

ART. I. FORMATION OF JURY. II. CONDUCT OF THE TRIAL. III. THE VERDICT.

ARTICLE I.

FORMATION OF THE JURY.

- 600. Jury, how drawn.
- 601. Challenges. Each party entitled to four peremptory challenges.
- 602. Grounds of challenge.
- 603. Challenges, how tried.
- 604. Jury to be sworn.

§ 600. When the action is called for trial by jury, the clerk must draw from the trial jury box of the court the ballots containing the names of the jurors, until the jury is completed or the ballots are exhausted.

Jury—generally, sec. 190, and note: trial jury, secs. 193, 194.

Trial by jury—conduct of, sec. 607 *et seq.*: waiver of, sec. 631: verdict after, sec. 624 *et seq.*

Trial jury box—sec. 246.

Jury completed—45 Cal. 323.

§ 601. Either party may challenge the jurors; but where there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff. [In effect July 1st, 1874.]

Challenge for cause—sec. 202, and note.

Peremptory challenge, when taken—see EXAMINATION OF JURORS, extent of: criminal cases, 37 Cal. 676.

Examination of jurors—object of, 23 Cal. 376: extent of, 45 Cal. 323.

Formation of jury—irregularity in, must be substantial, 6 Cal. 405; 9 Cal. 529; 32 Cal. 40.

§ 602. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this Code to render a person competent as a juror;

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2. Consanguinity or affinity within the fourth degree to any party;

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in business with either party, or surety on any bond or obligation for either party;

4. Having served as a juror or been a witness on a previous trial between the same parties, for the same cause of action;

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation;

6. Having an unqualified opinion or belief as to the merits of the action, founded upon knowledge of its material facts, or of some of them;

7. The existence of a state of mind in the juror evincing enmity against or bias to or against either party. [In effect July 1st, 1874.]

Challenge for cause, sufficiency of—*Specifying grounds*, 12 Cal. 483: criminal cases, 37 Cal. 277; 41 Cal. 37. *Objection, when to be made*, 1 Cal. 38; 18 Cal. 109.

GROUND OF CHALLENGE FOR CAUSE.

SUBDIVISION 1. Incompetency—secs. 198, 199, and notes; also, see note to subd. 4, *infra*, and 47 Cal. 388.

SUBDIVISION 2. Consanguinity or affinity—generally, see note to sec. 170, subd. 2.

SUBDIVISION 3. Close relations to either party—see notes to subds. 2 and 5.

SUBDIVISION 4. Previous trial, serving or testifying at—14 Cal. 163, and see 18 Cal. 109.

SUBDIVISION 5. Interest of juror—as to interest generally, see 5 Cal. 190.

SUBDIVISION 6. Unqualified opinion, possession of—excusing for, discretionary, 18 Cal. 109, and see 47 Cal. 388: formation or expression of, former requirement, 11 Cal. 69: degree of conviction necessary, (implied bias in criminal cases) 16 Cal. 129; 17 Cal. 142; 22 Cal. 349; 31 Cal. 507; 40 Cal. 288; 45 Cal. 137; 46 Cal. 78; 48 Cal. 253; 49 Cal. 174.

SUBDIVISION 7. Bias—review of decision as to, 49 Cal. 560; 50 Cal. 222: existence of, 5 Cal. 347; 38 Cal. 51.

§ 603. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

Jurors, examination of—see sec. 601a.

Discretion of court—decision not prejudicial, 41 Cal. 429; generally, 47 Cal. 388; 49 Cal. 679; 50 Cal. 222; and see notes to sec. 602, subds. 6 and 7.

§ 604. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between —, the plaintiff, and —, defendant, and a true verdict render, according to the evidence.

Oath, administration of—see secs. 2093-2097.

ARTICLE II.

CONDUCT OF THE TRIAL.

- § 607. Order of proceedings on trial.
- § 608. Charge to the jury. Court must furnish, in writing, upon request, the points of law contained therein.
- § 609. Special instructions.
- § 610. View by jury of the premises.
- § 611. Admonition when jury permitted to separate.
- § 612. Jury may take with them certain papers.
- § 613. Deliberation of jury, how conducted.
- § 614. May come into court for further instructions.
- § 615. Proceedings in case a juror becomes sick.
- § 616. When prevented from giving verdict, the cause may be again tried.
- § 617. While jury are absent, court may adjourn from time to time. Sealed verdict. Final adjournment discharges the jury.
- § 618. Verdict, how declared. Form of. Polling the jury.
- § 619. Proceedings when verdict is informal.

§ 607. When the jury has been sworn, the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs:

1. The plaintiff, after stating the issue and his case, must produce the evidence on his part;
2. The defendant may then open his defense, and offer his evidence in support thereof;
3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;
4. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the plaintiff must commence and may conclude the argument;
5. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;
6. The court may then charge the jury.

Order of proof, discretion of court, as to—generally, sec. 2042; 37 Cal. 438; 51 Cal. 468; party, control of, over, 8 Cal. 50; 15 Cal. 334; 44 Cal. 200; relevancy of evidence, secs. 1868-1870.

SUBDIVISION 1. Plaintiff's evidence—proof required, see secs. 1867; 1869.

SUBDIVISION 2. Defendant's evidence—see note to subd. 1.

SUBDIVISION 3. Rebutting evidence—Burden of proof, generally, sec. 186*n*: as test of right to rebut, see 15 Cal. 199; 48 Cal. 614. *Credibility, as to*, sec. 2053; 40 Cal. 578. *Discretion of court*, as to recalling witness, sec. 2050; 42 Cal. 298. *Re-opening case*—Where amendment of complaint, 33 Cal. 608: where cross-complaint, 49 Cal. 233: recalling witness, sec. 2050; 45 Cal. 80: supplementary proof, 6 Cal. 170; 26 Cal. 606; 38 Cal. 697; 42 Cal. 439; 47 Cal. 194, 590; 48 Cal. 614.

SUBDIVISION 4. Arguments—plaintiff opening and closing, 2 Cal. 388: reading law, 44 Cal. 65.

SUBDIVISION 5. Several defendants—separate trials, 40 Cal. 298.

SUBDIVISION 6. Charging the jury—secs. 608, 609.

CONDUCT OF TRIAL.

Actions—consolidating, sec. 1048: register of, sec. 1052. **Amendments—sec. 473 and notes.** **Appeals—sec. 936 *et seq.*** **Arguments—sec. 607, subd. 4.** **Case, calling up—sec. 594.** **Chambers—powers at**, secs. 165, 168, and notes. **Charge to jury—secs. 608, 609, and notes.** **Compromise—offer of**, sec. 997; **contempts**, secs. 1209-1222. **Continuance—sec. 595*n*, 595.** **Costs—sec. 1021 *et seq.*** **Court—trial by**, secs. 631-636. **Damages—sec. 657, subd. 5*n***; **deliberation of jury**, secs. 613, 614. **Dismissal—sec. 585**; and see WANT OF PROSECUTION. **Divorce—see sec. 76, subd. 4 note, sec. 125.** **Errors—of law**, sec. 657, subd. 7, note: **disregarded**, sec. 475. **Evidence—secs. 1823, 2104.** **Exceptions—secs. 646-653 and notes.** **Extensions of time—sec. 1054.** **Facts, jury determines—sec. 608 and note, sec. 2101.** **Findings—sec. 633 and note.** **Instructions to jury—generally**, sec. 608*n*: **special**, sec. 609*n*. **Judges—disqualifications of**, secs. 170-172: **sec. 397, subd. 4.** **Judgment—generally**, 577-582, 664*n*: **giving and entering**, secs. 664-675; **kinds of**, sec. 57*n*: **on pleadings**, sec. 585*n*. **Jury trial—secs. 600-623.** **Justices' court—trials in**, secs. 871-887. **Language of proceedings—sec. 185.** **Law, judge determines—secs. 608, 2102.** **Motions—sec. 1003 *et seq.*** **New trials—secs. 656-663**: **nonsuit**, sec. 581. **Notices—sec. 1010 *et seq.*** **Polling jury—sec. 618.** **Order of proof—607*n*, *supra*.** **Orders—1003-1009.** **Papers—lost or defectively entitled**, secs. 1045, 1046: **filing and service of**, sec. 1010-1017. **Place of trial—see VENUE.** **Pleadings—generally**, sec. 439-476: **rules as to**, secs. 452-465: **under Code**, sec. 421*n*: **judgment on**, sec. 585*n*. **Postponements—see CONTINUANCE.** **Private trial—sec. 125.** **Reference—secs. 638-645.** **Relief—sec. 590 and notes.** **Separation—of jury, admonition on**, sec. 611. **Special proceedings—secs. 1063-1022.** **Summary proceedings—secs. 1132-1179.** **Stipulations—sec. 283, subd. 1*n*.** **Testimony, taking down—clerk**, sec. 1051: **short-hand reporter**, secs. 268-274. **Three-fourths—of jury, agreement of**, sec. 618*n*. **Trial—generally**, secs. 588-663. **Variance—secs. 469-471.** **Venue—secs. 439-400**: **change of**, sec. 397 *et seq.* **Verdict—secs. 624-628.** **View—by jury**, sec. 610. **Waiver—of jury trial**, sec. 631. **Witnesses—see EVIDENCE.** **Writings—see EVIDENCE:** **inspection of**, sec. 1600. **Want of prosecution—dismissal for**, sec. 594*n*.

§ 608. In charging the jury, the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon

request, a statement, in writing, of the points of law contained in the charge, or sign at the time a statement of such points prepared and submitted by the counsel of either party.

Matters of law—court stating in charge, Const. Cal. art. 6, sec. 19; sec. 2102, also sec. 2061, and see under CHARGE TO JURY, *infra*.

Stating testimony—20 Cal. 432; 43 Cal. 85: constitutional provision, see last note.

Questions of fact—jury exclusive judges of, Const. Cal. art. 6, sec. 19; sec. 2101, also sec. 2061; 17 Cal. 166, and see under CHARGE TO JURY, *infra*. Law also, for jury, in libel, see Const. Cal. art. 1, sec. 9.

Charge to jury—Scope of, see Instructions, generally, *infra*, and Special instructions, sec. 609n. Construction of, 1 Cal. 476; 22 Cal. 43; 48 Cal. 85; 49 Cal. 560. Law matters, on, see note, *supra*, and 7 Cal. 424; 41 Cal. 123; 47 Cal. 56; 52 Cal. 315. Fact, on questions of, see note, *supra*, and 22 Cal. 492; 23 Cal. 193; 24 Cal. 502; 51 Cal. 603; People v. Wong Ah Ngow, Feb. 10th, 1880, 4 Pac. C. L. J. 552; McFadden v. Mitchell, April 22nd, 1880, 5 Pac. C. L. J. 334; point treated as proven, 13 Cal. 427; 18 Cal. 376; 20 Cal. 56; 33 Cal. 299; 34 Cal. 663; 41 Cal. 123; 51 Cal. 603; 52 Cal. 315; 53 Cal. 625, and see ASSUMING FACT, under Instructions generally, *infra*.

INSTRUCTIONS GENERALLY.

Asking—see special instructions, sec. 609n. Assuming fact—23 Cal. 193; 24 Cal. 502; 25 Cal. 197; 30 Cal. 539; 33 Cal. 299; 50 Cal. 236; 53 Cal. 612, 720. Charge in—see CHARGE TO JURY, note *supra*. Conflicting—see CONTRADICTORY. Contradictory—or inconsistent, 30 Cal. 312; 39 Cal. 573; 43 Cal. 532; 44 Cal. 65, 246; 52 Cal. 465; 53 Cal. 56, 708. Correct—see PROPER. Equity—special issues, 7 Cal. 424. Erroneous—1 Cal. 333; 6 Cal. 433; 8 Cal. 341; 9 Cal. 565; 19 Cal. 143; 24 Cal. 839; 29 Cal. 25, 123; 52 Cal. 246, 315; 53 Cal. 354, 360, 604, 612, 720; Black v. Sprague, March 6th, 1880, 5 Pac. C. L. J. 92; McFadden v. Mitchell, April 22nd, 1880, 5 Pac. C. L. J. 334; Sargent v. Linden G. M. Co. May 24th, 1880, 5 Pac. C. L. J. 404; People v. Miles, May 26th, 1880, 5 Pac. C. L. J. 420; and see REQUISITES OF; also SPECIAL INSTRUCTIONS, REPEAL OF, sec. 609n. Effect of, see ERRORS OF LAW, sec. 657; subd. 7 and notes. Extent of—23 Cal. 331; 33 Cal. 362. Fact, on questions of—see note, *supra*; fraud, 6 Cal. 119; 8 Cal. 87, 267; 19 Cal. 143; McFadden v. Mitchell, April 22nd, 1880, 5 Pac. C. L. J. 334; Parks v. Barney, June 11th, 1880, 5 Pac. C. L. J. 420. General, too—1 Cal. 366. Granting—see under SPECIAL INSTRUCTIONS, sec. 609n. Inconsistent—see CONTRADICTORY. Irreconcilable—see CONTRADICTORY. Law, on matters of—see note, *supra*. Libel—Const. Cal. art. 1, sec. 9; 46 Cal. 124. Malicious prosecution—29 Cal. 644; 52 Cal. 246; 53 Cal. 189. Objections to—see EXCEPTIONS, under Special Instructions, sec. 609n. Oral—53 Cal. 574. Passing on—see under Special Instructions, sec. 609n. Pertinency of evidence—submitting, 49 Cal. 56. Point—treated as proven in, see ASSUMING FACT, and CHARGE, note, *supra*. Presumed—correct, 53 Cal. 420; proper, 17 Cal. 123; 20 Cal. 56; 31 Cal. 115; 33 Cal. 362; 49 Cal. 580; 53 Cal. 491; Williams v. Hartford F. Ins. Co. March 29th, 1880, 5 Pac. C. L. J. 227. Refusal of—see under SPECIAL INSTRUCTIONS, sec. 609n. Relevant—2 Cal. 39, 217; 9 Cal. 353; 24 Cal. 17; 28 Cal. 390; 36 Cal. 404; 39 Cal. 123, 691; 45 Cal. 496; 47 Cal. 93; 50 Cal. 669. Requisites of—see ASSUMING FACT, CONTRADICTORY, GENERAL, RELEVANT, VAGUE. Special—sec. 609n. Supplementary—43 Cal. 274. Testimony on—where uncontradicted, 43 Cal. 544; stating,

see note, *supra*. Useless—53 Cal. 420. Usual—sec. 2061; see also, sec. 2102. Vague—39 Cal. 690; and see TOO GENERAL.

§ 609. Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.

Instructions, disposition of—asking, granting, refusing, modifying, manner of passing on, see those heads under Special Instructions, *infra*.

SPECIAL INSTRUCTIONS.

Adding to—47 Cal. 93. Asking—6 Cal. 197; 16 Cal. 78; 48 Cal. 237, 277; 53 Cal. 613; Williams v. Hartford Fire Ins. Co. March 29th, 1880, 5 Pac. C. L. J. 227. Disregarding—6 Cal. 197. Exceptions to—sec. 646 and notes. Granting—3 Cal. 390; 13 Cal. 172; 17 Cal. 143; 41 Cal. 66. Modifying—see ADDING TO, GRANTING, PASSING ON, OFFERING; see ASKING. Passing on—manner of, 2 Cal. 173; 5 Cal. 490; 19 Cal. 476, 683; 25 Cal. 460; 32 Cal. 280; 34 Cal. 101; 37 Cal. 154; 40 Cal. 543; 49 Cal. 166; see also ADDING TO, GRANTING, MODIFYING, REFUSAL. Presenting—see ASKING. Proposed—6 Cal. 197; 29 Cal. 556. Reading—time of, 29 Cal. 556. Refusal of—proper, 5 Cal. 478; 6 Cal. 197; 3 Cal. 275, 390; 9 Cal. 353; 13 Cal. 599; 29 Cal. 556; 32 Cal. 231; 36 Cal. 404; 45 Cal. 496; 47 Cal. 93; 49 Cal. 166; 53 Cal. 354, 630; People v. Smallmans, May 15th, 1880; improper, 2 Cal. 335; 52 Cal. 611; reasons for, 8 Cal. 396; curing, 8 Cal. 87; 30 Cal. 631; 50 Cal. 469; People v. Ah Chung, March 22nd, 1880, 5 Pac. C. L. J. 218; Stemers v. Elsen, March 24th, 1880, 5 Pac. C. L. J. 248. Time, presenting in—where many, 6 Cal. 197.

§ 610. When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

View of premises—19 Cal. 427; 49 Cal. 607; 50 Cal. 556; 53 Cal. 60.

§ 611. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

Temporary recess—question as to application, 23 Cal. 631.

§ 612. Upon retiring for deliberation, the jury may take with them all papers which have been received as evi-

dence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person.

Inspection of documents—by, 36 Cal. 168.

§ 613. When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they or three-fourths of them are agreed upon a verdict; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon. [In effect March 10th, 1880.]

Retiring for deliberation—Temporary separation, 5 Cal. 275; 19 Cal. 427; 20 Cal. 433; 21 Cal. 337; 22 Cal. 348. *Influence of judge*, 29 Cal. 258.

Three-fourths—agreement of, amdt. 1880; see Const. Cal. art. 1, sec. 7.

§ 614. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel.

Information given—extent of, 45 Cal. 338; on non-judicial days, sec. 164, subd. 1.

Absence of attorneys—criminal cases, 5 Cal. 148; 37 Cal. 274.

§ 615. If, after the impanneling of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterward impanneled.

§ 616. In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the

cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.

Jury discharged—formalities, 48 Cal. 324; on non-judicial days, 49 Cal. 226.

§ 617. While the jury are absent the court may adjourn from time to time, in respect to other business; but it is nevertheless open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day. [In effect March 10th, 1880.]

Sealed verdict—bringing in, 12 Cal. 483.

Adjournment for term—effect of, before amdt. 1880, 48 Cal. 324; 50 Cal. 648; abolition of terms, by Const. 1879, see sec. 73*n*.

§ 618. When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict; if upon such inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case. [In effect March 10th, 1880.]

Three-fourths—agreement of, see sec. 613*n*.

Verdict received—on non-judicial day, sec. 134.

Polling jury—20 Cal. 69.

Dissenting—more than one-fourth, amdt. 1880; grounds for, 48 Cal. 588.

§ 619. When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

Corrected by jury—2 Cal. 183, 269.

Court, power of—2 Cal. 183; 3 Cal. 137; 34 Cal. 663.

Waiver—4 Cal. 260.

ARTICLE III.

THE VERDICT.

- § 624. General and special verdicts defined.
- § 625. When a general or special verdict may be rendered.
- § 626. Verdict in actions for recovery of money or on establishing counter-claim.
- § 627. Verdict in actions for the recovery of specific personal property.
- § 628. Entry of verdict.

§ 624. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them: and those conclusions of fact must be so presented, as that nothing shall remain to the court but to draw from them conclusions of law.

Verdict, scope of—confined by pleadings and issues, 2 Cal. 183, 251; 6 Cal. 433; 38 Cal. 507; 41 Cal. 123: sufficient form, 25 Cal. 479; 40 Cal. 657: and as to amending, see sec. 473; 3 Cal. 137: ejectment in, secs. 740, 741: intendments as to, see generally, INTENDMENTS, sec. 53*n*: new trials for misconduct affecting, sec. 657, subd. 2 and note; joint defendants, against, 6 Cal. 197; 15 Cal. 27; 25 Cal. 123: waiver of informality in, 38 Cal. 507; 40 Cal. 408.

General verdict—14 Cal. 168; 15 Cal. 162; 25 Cal. 479; and see SCOPE OF VERDICT, *supra*.

Special verdict—sec. 625*n*.

§ 625. In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

General verdict—sec. 624*n*.

Special verdict—*Character of*, 16 Cal. 113; 17 Cal. 299, 510; 19 Cal. 101; 21 Cal. 98. *Directed by court*, 3 Cal. 396. *Special issues*, 4 Cal. 6; 8 Cal. 501; 23 Cal. 482; 27 Cal. 360. *Change of verdict*, from special to general, 25 Cal. 539; 48 Cal. 588. *Special finding*, effect on general verdict, 20 Cal. 289; 23 Cal. 489; 31 Cal. 115: and as to equity, see 49 Cal. 126; 52 Cal. 430: insufficient, when, 50 Cal. 61.

§ 626. When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant when a counter-claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

Amount of recovery—*Watson v. Damon*, March 5th, 1880, 5 Pac. C. L. J. 97.

§ 627. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or, if being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and, if so instructed, the value of specific portions thereof, and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property. [In effect July 1st, 1874.]

Verdict in replevin—7 Cal. 568; 8 Cal. 446; 21 Cal. 274; 24 Cal. 147.

§ 628. Upon receiving a verdict, an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length, and where a special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

the assignee may recover the property, or the value thereof, as assets of such insolvent debtor; and if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of fraud.

Fraudulent preferences and transfers—Civil Code, secs. 3439-3442; 5 Cal. 486; 10 Cal. 227, 269; 12 Cal. 281; 13 Cal. 62; 19 Cal. 41; 21 Cal. 11; 22 Cal. 194; 23 Cal. 233, 514; 34 Cal. 36, 100; 35 Cal. 223, 302; 37 Cal. 328; 41 Cal. 239, 545; 42 Cal. 361; 49 Cal. 620; 51 Cal. 521; 53 Cal. 197.

Assignments for benefit of creditors—Civil Code, secs. 3449-3473; 2 Cal. 107; 3 Cal. 471; 5 Cal. 210; 8 Cal. 152; 10 Cal. 289, 274; 12 Cal. 469; 14 Cal. 450; 41 Cal. 566.

ARTICLE IX.

PENAL CLAUSES.

§ 56. From and after the taking effect of this act, if any debtor or insolvent shall, after the commencement of proceedings in insolvency, secrete or conceal any property belonging to his estate, or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same or any part thereof, with intent to prevent it from coming into the possession of the assignee in insolvency, or to hinder, impede, or delay his assignee in recovering or receiving the same, or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate, with like intent, or shall spend any part thereof in gaming; or shall, with intent to defraud, willfully and fraudulently conceal from his assignee, or fraudulently or designedly omit from his schedule any property or effects whatsoever; or if in case of any person having to his knowledge or belief proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or shall attempt to account for any of his property by fictitious losses or expenses; or shall, within three months before the commencement of proceedings in insolvency, under the false pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels, with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in insolvency, pawn, pledge, or dispose of otherwise than by *bona fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit

and remain unpaid for, he shall be deemed guilty of misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than three months nor more than two years.

Concealing property, etc.—see Penal Code, sec. 154.

Fraudulent 'dealing with' books or writing—see Penal Code, sec. 132.

Fraud—sec. 49a; 19 Cal. 143.

Fraudulent preferences and transfers—sec. 35a.

ARTICLE X.

MISCELLANEOUS.

§ 57. If any debtor shall die after the order of adjudication, the proceedings shall be continued and concluded in like manner and with like validity and effect as if he had lived.

Continuance of proceedings—after death of party, compare Code Civ. Proc. sec. 385.

§ 58. Pending proceedings by or against any person, copartnership, or corporation, no Statute of Limitations of this State shall run against a claim which in its nature is provable against the estate of the debtor.

Limitations generally—see Code Civ. Proc. sec. 312a.

§ 59. Any creditor, at any stage in the proceedings, may be represented by his attorney or duly authorized agent.

Attorney—see Code Civ. Proc. sec. 275 *et seq.*

§ 60. It shall be the duty of the court having jurisdiction of the proceedings, to exempt and set apart for the use and benefit of said insolvent such real and personal property as is by law exempt from execution; and also a homestead in the manner as provided in section one thousand four hundred and sixty-five of the Code of Civil Procedure.

Property exempt from execution—see Code Civ. Proc. sec. 690 and notes.

§ 61. The filing of the petition by or against a debtor upon which an order of adjudication in insolvency may be made by the court, shall be deemed to be the commencement of proceedings in insolvency under this act.

§ 62. Words used in this act in the singular include the plural, and in the plural, the singular, and the word "debtor" includes partnerships and corporations.

Meaning of words—compare Code Civ. Proc. sec. 17.

PART IV.

OF EVIDENCE.

- GENERAL DEFINITIONS. §§ 1823-1839.**
- TITLE I. OF GENERAL PRINCIPLES. §§ 1844-1870.**
- II. KINDS AND DEGREES OF EVIDENCE. §§ 1875-1978.**
- III. PRODUCTION OF EVIDENCE. §§ 1981-2054.**
- IV. EFFECT OF EVIDENCE. § 2061.**
- V. RIGHTS AND DUTIES OF WITNESSES. §§ 2064-2070.**
- VI. EVIDENCE IN PARTICULAR CASES, AND GENERAL PROVISIONS. §§ 2074-2103.**

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PENAL APPENDIX.—54.

OF EVIDENCE.

GENERAL DEFINITIONS AND DIVISIONS.

- 1823. Definition of evidence.
- 1824. Definition of proof.
- 1825. Definition of law of evidence.
- 1826. The degree of certainty required to establish facts.
- 1827. Four kinds of evidence specified.
- 1828. Several degrees of evidence specified.
- 1829. Original evidence defined.
- 1830. Secondary evidence defined.
- 1831. Direct evidence defined.
- 1832. Indirect evidence defined.
- 1833. Primary evidence defined.
- 1834. Partial evidence defined.
- 1835. Satisfactory evidence defined.
- 1836. Indispensable evidence defined.
- 1837. Conclusive evidence defined.
- 1838. Cumulative evidence defined.
- 1839. Corroborative evidence defined.

§ 1823. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

Evidence—law of, sec. 1825: kinds of, sec. 1827: degrees of, sec. 1828 *et seq.*: relevancy of, secs. 1868, 1870: production of, see sec. 1825, subd. 3, note: value and effect of, see sec. 1825, subd. 5, note.

§ 1824. Proof is the effect of evidence, the establishment of a fact by evidence.

Definition of term—31 Cal. 201.

Proof—degree required, sec. 1826: order of, secs. 607, 2042: extent of, secs. 1867, 1869: limits of, secs. 1868, 1870: burden of, secs. 1869, 1981: method of making, 31 Cal. 201.

§ 1825. The law of evidence, which is the subject of this part of the Code, is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,
3. For the production of legal evidence;
4. For the exclusion of whatever is not legal;
5. For determining in certain cases, the value and effect of evidence.

SUBDIVISION 1. Proof unnecessary—when, see sec. 1827, subd. 1, note.

SUBDIVISION 2. Presumptions—secs. 1959, 1961-1963 and notes.

SUBDIVISION 3. Production of evidence—secs. 1961-2054.

SUBDIVISION 4. Exclusion of evidence—secs. 1867, 1868.

SUBDIVISION 5. Value and effect of evidence—sec. 2061; also see sec. 1828 *et seq.*

§ 1826. The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

Proof—sec. 1824 and note.

§ 1827. There are four kinds of evidence:

1. The knowledge of the court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses.

SUBDIVISION 1. Knowledge of the court—sec. 1875 and notes.

SUBDIVISION 2. Witnesses—secs. 1878-1884.

SUBDIVISION 3. Writings—secs. 1887-1931.

SUBDIVISION 4. Other material objects—sec. 1954.

§ 1828. There are several degrees of evidence:

1. Primary and secondary;
2. Direct and indirect;
3. *Prima facie*, partial, satisfactory, indispensable, and conclusive. [In effect July 1st, 1874.]

§ 1829. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents. [In effect July 1st, 1874.]

§ 1830. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and contents. [In effect July 1st, 1874.]

Secondary evidence—that conveyance authorized by corporation. 52 Cal. 192.

Contents of a writing—evidence of, sec. 1855.

§ 1831. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example: if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it, is direct.

§ 1832. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

Indirect evidence—secs. 1957-1963. .

§ 1833. *Prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is *prima facie* evidence of a record, but it may afterward be rejected upon proof that there is no such record. [In effect July 1st, 1874.]

Prima facie evidence—seal of corporation as, 52 Cal. 192.

Disputable presumption—sec. 1963.

§ 1834. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example: on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterward connected with the fact in dispute.

Connected with the fact in dispute—sec. 1868.

§ 1835. That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

Satisfactory evidence—to justify verdict, sec. 2061, subd. 5.

§ 1836. Indispensable evidence is that without which a particular fact cannot be proved.

Indispensable evidence—secs. 1967-1974.

§ 1837. Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example: the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

Conclusive evidence—secs. 1908, 1962, 1978.

§ 1838. Cumulative evidence is additional evidence of the same character to the same point.

§ 1839. Corroborative evidence is additional evidence of a different character, to the same point.

TITLE I. OF THE GENERAL PRINCIPLES OF EVIDENCE.

- § 1844. One witness sufficient to prove a fact.
- § 1845. Testimony confined to personal knowledge.
- § 1846. Testimony to be in presence of persons affected.
- § 1847. Witness presumed to speak the truth.
- § 1848. One person not affected by acts of another.
- § 1849. Declarations of predecessor in title evidence.
- § 1850. Declarations which are a part of the transaction
- § 1851. Evidence relating to third person.
- § 1852. Declaration of decedent evidence of pedigree.
- § 1853. Declaration of decedent evidence against his successor in interest.
- § 1854. When part of a transaction proved, the whole is admissible.
- § 1855. Contents of writing, how proved.
- § 1856. An agreement reduced to writing deemed the whole.
- § 1857. Construction of language relates to place where used.
- § 1858. Construction of statutes and instruments, general rule.
- § 1859. The intention of the Legislature or parties.
- § 1860. The circumstances to be considered.
- § 1861. Terms to be construed in their general acceptation.
- § 1862. Written words control those printed in a blank form.
- § 1863. Persons skilled may testify to decipher characters.
- § 1864. Of two constructions, which preferred.
- § 1865. A written instrument construed as understood by parties.
- § 1866. Construction in favor of natural right preferred.
- § 1867. Material allegations only to be proved.
- § 1868. Evidence confined to material allegations.
- § 1869. Affirmative only to be proved.
- § 1870. Facts which may be proved on trial.

§ 1844. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.

One witness—witness, definition, sec. 1878: witness, competency, sec. 1879 *et seq.*: two witnesses for lost or destroyed will, sec. 1339: perjury and treason, more than one witness, sec. 1968.

§ 1845. A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.

Opinions, inferences, declarations—see sec. 1870 and notes: testimony as to, 22 Cal. 565; 43 Cal. 485.

§ 1846. A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the

presence and subject to the examination of all the parties, if they choose to attend and examine.

Witness—defined, sec. 1878.

Witnesses—competency of, sec. 1879 *et seq.*

Oath or affirmation—administration of, secs. 2003-2007.

Examination of witnesses—secs. 2042-2054.

§ 1847. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

Witness—sec. 1878 *et seq.*

Presumed to speak the truth—sec. 1963, subd. 1: evidence of good character, sec. 2053.

Presumption repelled—manner of testifying, sec. 2061, subd. 2: character of testimony, sec. 2061, subd. 3: impeaching credit, secs. 2049, 2051, 2052: motives, hostility, 52 Cal. 380: contradictory evidence, sec. 2049, 2051.

Jury exclusive judges of credibility—sec. 2061.

§ 1848. The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another. [In effect July 1st, 1874.]

Particular relation—requisite, 2 Cal. 145: wife, where marriage in issue, 9 Cal. 593: husband, crime of, not imputed to wife, 49 Cal. 637: partner, agent, etc. sec. 1870, subd. 5: parties to fraud, 20 Cal. 598: officers and master of vessel, 33 Cal. 61: attorney, 47 Cal. 249.

Declaration, etc., of another—when admissible, secs. 1849-1853.

§ 1849. Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former.

Construction of section—50 Cal. 478.

Declarations of predecessor—admissible, 12 Cal. 163; 30 Cal. 430; 33 Cal. 466; 38 Cal. 51; 42 Cal. 298: relating to the real property, 50 Cal. 478: while holding the title, 2 Cal. 148; 12 Cal. 496; 25 Cal. 202; 38 Cal. 278: against the former, 23 Cal. 347; 49 Cal. 294; 53 Cal. 348: estoppel by, 5 Cal. 84: analogous doctrine as to personality, 40 Cal. 474; and see "fraud," under *RES GESTÆ*, sec. 1850*n*.

§ 1850. Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction.

Res geste, part of—declarations, etc., forming. *Generally*, time of declarations, 35 Cal. 49; 52 Cal. 212; written declarations, etc., may be, sec. 1946; 21 Cal. 374; 47 Cal. 294: declarations not forming, 42 Cal. 27; 48 Cal. 462. *Special instances*, assault, 35 Cal. 274; 49 Cal. 388; conspiracy, in furtherance of, 27 Cal. 572: declarations before others, sec. 1870, subd. 3; 29 Cal. 637: dying declaration, sec. 1870, subd. 4; 35 Cal. 49: entries in corporation books, when inadmissible, 52 Cal. 248: fraud, impeaching sale for, 7 Cal. 391; 8 Cal. 109, 325; 15 Cal. 50; 23 Cal. 331; 25 Cal. 202; 36 Cal. 205: insurance policy, *Fishbeck v. Phoenix Ins. Co.* March 24th, 1880, 5 Pac. C. L. J. 212: malice, 35 Cal. 373: writing, to explain, sec. 1860.

§ 1851. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is *prima facie* evidence between the parties. [In effect July 1st, 1874.]

§ 1852. The declaration, act, or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible.

Declaration of decedent—sec. 1870, subd. 4.

Common reputation—on questions of pedigree, etc., sec. 1870, subd. 11.

§ 1853. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

Decedent's declaration against interest—sec. 1870, subd. 4; 44 Cal. 269; 45 Cal. 137; 46 Cal. 610; 47 Cal. 342: entries and other writings, sec. 1946.

§ 1854. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence.

Part, admitting more—section applicable, 3 Cal. 106; 5 Cal. 133; 9 Cal. 523; 10 Cal. 371; 12 Cal. 564; 19 Cal. 689; 25 Cal. 128; 29 Cal. 497, 641; 36 Cal. 648; 38 Cal. 279: section inapplicable, 30 Cal. 65, 542; 32 Cal. 369: error under section, when not prejudicial, 50 Cal. 137: documents, cross-examination, etc., secs. 2047, 2048: related documents as evidence, 47 Cal. 294.

§ 1855. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. Where the original has been lost or destroyed; in which case proof of the loss or destruction must first be made;

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice;

3. When the original is a record or other document in the custody of a public officer;

4. When the original has been recorded, and a certified copy of the record is made evidence by this Code or other statute;

5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subdivisions three and four, a copy of the original or of the record must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents. [In effect July 1st, 1874.]

Nature of provision—9 Cal. 430; 10 Cal. 126.

Contents of writing—showing permissible, secs. 1937, 1969; 5 Cal. 467; 9 Cal. 593; 13 Cal. 84; 43 Cal. 162; 49 Cal. 264; 50 Cal. 353.

SUBDIVISION 1. Original lost or destroyed—proof requisite, 5 Cal. 389; 9 Cal. 430; 15 Cal. 183; 19 Cal. 640; diligent search unsuccessful, 5 Cal. 502, 517; 6 Cal. 460; 12 Cal. 104; 15 Cal. 63, 372; 18 Cal. 165; 19 Cal. 683; 22 Cal. 659; 29 Cal. 665; 30 Cal. 360; 33 Cal. 320; 49 Cal. 653, 671; beyond control, 8 Cal. 49; 13 Cal. 638; 19 Cal. 94; 27 Cal. 54; secondary evidence admitted, 8 Cal. 49; 12 Cal. 11; 17 Cal. 569; 22 Cal. 50; 26 Cal. 270; 51 Cal. 198; recorder's book as evidence, 17 Cal. 43.

SUBDIVISION 2. Original in possession of opponent—notice to produce, secs. 1938, 1939; 12 Cal. 403; 15 Cal. 63; secondary evidence admitted, 9 Cal. 593; 12 Cal. 403; 38 Cal. 584; denial of existence need not be proved, sec. 1869.

SUBDIVISION 3. Public records—7 Cal. 110, 288; 12 Cal. 20; 18 Cal. 479; public writings generally, secs. 1892-1926.

SUBDIVISION 4. Original on record—certified copy admissible when, 3 Cal. 427; 6 Cal. 488, 579; 12 Cal. 306; 13 Cal. 638; 25 Cal. 122; 27 Cal. 50, 236; 38 Cal. 216, 442.

§ 1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dis-

pute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

Parol evidence inadmissible—to vary or contradict written agreement, Civil Code, sec. 1639; 2 Cal. 37; 4 Cal. 355; 7 Cal. 282, 9 Cal. 23, 228; 10 Cal. 288; 12 Cal. 170; 19 Cal. 354; 22 Cal. 155; 24 Cal. 411; 35 Cal. 336; 47 Cal. 594; 48 Cal. 359; 50 Cal. 553; 51 Cal. 341; 52 Cal. 36; writing supercedes oral negotiations, Civil Code, sec. 1625; 23 Cal. 256; 24 Cal. 634; 41 Cal. 325; 43 Cal. 159; contract must be complete, 22 Cal. 501; 30 Cal. 54; 33 Cal. 112; 37 Cal. 437; recitals in written instrument conclusive, sec. 1962, subd. 2 and notes; rule confined to parties and those claiming under them, 50 Cal. 250.

Parol evidence—admissible, alterations and erasures, to explain, sec. 1982; 48 Cal. 147; ambiguity, to explain, 11 Cal. 194; circumstances, see surrounding circumstances: consideration, to show real, sec. 1532, subd. 2; 48 Cal. 97; deed, see mortgage; discharge, to show, see waiver; fraud, to establish, see Civil Code, sec. 1640; mistake or imperfection, to correct, sec. 1856, subd. 1, *supra*; Civil Code, sec. 1640; 12 Cal. 208; 13 Cal. 556; 17 Cal. 55; 19 Cal. 661; 23 Cal. 121; 29 Cal. 159; 39 Cal. 609; 48 Cal. 239; 50 Cal. 353; 51 Cal. 172; mortgage, to prove conveyance intended as, sec. 744; 13 Cal. 116; 15 Cal. 287; 24 Cal. 385; 27 Cal. 603; 29 Cal. 18; 36 Cal. 29; 37 Cal. 452; receipt, to explain, 10 Cal. 176; 15 Cal. 44; revision and reformation of contracts, for, Civil Code, secs. 3389-3402; 21 Cal. 122; 23 Cal. 249; 45 Cal. 79; 46 Cal. 346, 644; surrounding circumstances, to show, sec. 1860 and notes, 51 Cal. 125; 52 Cal. 496; 53 Cal. 120; trust, or absence of, to show, 20 Cal. 126; 22 Cal. 589; 52 Cal. 353; validity of agreement controverted, where, sec. 1856, subd. 2, *supra*; 48 Cal. 610; 50 Cal. 595; waiver or discharge, to show, 16 Cal. 138; 19 Cal. 158; 30 Cal. 547; 39 Cal. 169; 50 Cal. 9; 51 Cal. 166, 575.

§ 1857. The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place.

Interpretation of contract—*lex loci*, Civil Code, sec. 1646.

§ 1858. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Construction—generally, sec. 1859 and notes; declaring what is written, 24 Cal. 539; giving effect to all, Civil Code, secs. 1641, 3541; 1 Cal. 162, 200; 3 Cal. 473; 5 Cal. 169; 6 Cal. 47; 22 Cal. 11; 24 Cal. 518; 28 Cal. 142; 51 Cal. 240, 412; 32 Cal. 499; 34 Cal. 183; 38 Cal. 572.

§ 1859. In a construction of a statute, the intention of the Legislature, and in the construction of the instrument, the intention of the parties, is to be pursued if possible; and when a general and particular provision are

inconsistent, the latter is paramount to the former. So a particular intent will control a general one, that is inconsistent with it.

Construction of statutes—Amendments, and conflicting statutes, sec. 18n. *Conflict of statutes*, 51 Cal. 474; Codes, 51 Cal. 295; and conflicting statutes, sec. 18n. *Constitutionality*, generally, 13 Cal. 175; 22 Cal. 393; 24 Cal. 539; 26 Cal. 135; 36 Cal. 379; 41 Cal. 149; 47 Cal. 222; 49 Cal. 117; particular instances, 2 Cal. 183, 198, 424, 524, 580; 5 Cal. 24, 86; 6 Cal. 143; 9 Cal. 147; 13 Cal. 159, 519; 14 Cal. 12, 566; 15 Cal. 429; 18 Cal. 678; 19 Cal. 82, 513; 22 Cal. 293; 24 Cal. 518, 638; 26 Cal. 161; 48 Cal. 279; 49 Cal. 402, 433, 435, 438, 446, 449, 478, 557; 50 Cal. 284; 51 Cal. 15, 266, 269, 352, 381; 52 Cal. 196, 208, 482, 606; 53 Cal. 48, 152, 475, 608; *Ex parte Fraser*, Jan. 28th, 1880, 4 Pac. C. L. J. 497; *Hib. Sav. & L. Soc. v. Jordan*, May 19th, 1880, 5 Pac. C. L. J. 381; under Const. Cal. 1879, 53 Cal. 745; *Weil v. Kenfield*, Feb. 2nd, 1880, 4 Pac. C. L. J. 523; *McDonald v. Patterson*, March 2nd, 1880, 5 Pac. C. L. J. 41; *Ex parte Toland*, March 19th, 1880, 5 Pac. C. L. J. 182; *Eyatt v. Allen*, March 23rd, 1880, 5 Pac. C. L. J. 664; *Ewing v. Oro Mfg. Co.*, June 14th, 1880, 5 Pac. C. L. J. 522; *Desmond v. Dunn*, June 21st, 1880, 5 Pac. C. L. J. 579; *S. F. v. S. V. W. Co.*, June 22nd, 1880, 5 Pac. C. L. J. 650; *Oakland Text-Book Case*, June 22nd, 1880, 5 Pac. C. L. J. 622. *Correlative statutes*, sec. 18n; 53 Cal. 199. *Curative acts*, 47 Cal. 236; 51 Cal. 86, 91, 92; 53 Cal. 90, 233. *Directory statutes*, generally, 30 Cal. 524; 33 Cal. 492; 36 Cal. 595; 48 Cal. 146; particular instances, 4 Cal. 275; 32 Cal. 68; 44 Cal. 229; 48 Cal. 133; 49 Cal. 157; 52 Cal. 459, 553; contrary construction, see MANDATORY ACTS. *Forfeiture*, statutes imposing strictly construed, 1 Cal. 55. *Generally*, 48 Cal. 121, 127, and see RULES. *Grant*, legislative, 13 Cal. 458. *Mandatory acts*, 36 Cal. 595; 50 Cal. 563; 51 Cal. 3; 53 Cal. 245. *Notice*, constructive, strict construction of provisions for, 1 Cal. 162; 7 Cal. 294; 20 Cal. 81; 31 Cal. 356; but under Code, see sec. 4. *Penal statutes*, strict construction abolished by Codes, 45 Cal. 431; 49 Cal. 68. *Remedial statutes*, 2 Cal. 596; 3 Cal. 119; 6 Cal. 470. *Repeal of statutes*, see sec. 18 and notes; 15 Cal. 294; *Lamb v. Schottler*, March 17th, 1880, 5 Pac. C. L. J. 140; *Hib. S. & L. Soc. v. Jordan*, May 19th, 1880, 5 Pac. C. L. J. 381; statutes continued under Codes, 49 Cal. 393. *Retroactive statutes*, 53 Cal. 274, and see sec. 3 and note; held not, 50 Cal. 244; 51 Cal. 86, 91, 92, 360; 53 Cal. 81. *Rules*, Code, construction for, secs. 4-15 and notes; contemporaneous exposition as aid, Civil Code, sec. 3535; 1 Cal. 523; 31 Cal. 86; 36 Cal. 638; expression of one thing is exclusion of another, 26 Cal. 378; generally, see secs. 1857-1859, 1860-1866; intention of legislature is guide, 6 Cal. 216; 15 Cal. 294; 22 Cal. 11; 24 Cal. 539; 30 Cal. 325; 31 Cal. 86; 36 Cal. 595; legislative discussions immaterial, 28 Cal. 55; 41 Cal. 146; particular provision, etc., controls, Civil Code, sec. 3534; 7 Cal. 96; retrospective construction not favored, 27 Cal. 159; title as aid, 16 Cal. 365; 19 Cal. 512; 36 Cal. 595; 47 Cal. 222; 51 Cal. 303; 52 Cal. 459, 553; words and phrases, as to, secs. 15, 16, 17; 13 Cal. 518; 24 Cal. 539; 43 Cal. 332; and where error in, see 28 Cal. 265; 81 Cal. 114. *Special law*, 53 Cal. 199. *Time*, statutes fixing, see COMPUTATION OF TIME, sec. 12n. *Various cases*, 49 Cal. 407, 525, 563, 571; 50 Cal. 64, 70, 86, 153, 188, 195, 248, 403, 561; 51 Cal. 3, 12, 273, 388, 406, 478; 53 Cal. 21, 190, 386, 416, 475, 482, 571; and see under CONSTITUTIONALITY. **Construction of instruments—Bonds**, 51 Cal. 473; see UNDER-TAKINGS GENERALLY, sec. 94n, and CONTRACTS, *infra*. *Charters*, 18 Cal. 647. *Contracts*—conditions in, sec. 457n; 27 Cal. 27; 53 Cal. 721; forfeiture, imposing strictly construed, 1 Cal. 55; 48 Cal. 245; insurance policy, 51 Cal. 101; *Helbing v. Svea Ins. Co.*, Feb. 12th, 1880, 4 Pac. C. L. J. 559; *Fishbeck v. Phoenix Ins. Co.*, March 24th, 1880, 5 Pac. C. L. J. 212; *Williams v. Hartford F. Ins. Co.*, March 29th, 1880, 5 Pac. C. L. J. 227; interpretation of, Civil Code, secs. 1635-1661, 1731, 1733, 1734, 2053, 3534-3538, 3541, 3542; Political Code, sec. 3222; 32 Cal. 376; 50 Cal. 207, 417, 585; 51 Cal. 94, 166, 188, 223, 516, 554. 52 Cal. 306, 624; 53 Cal. 46; lease, 49 Cal. 566; 51 Cal. 236; 53 Cal. 461; promissory note, *Chamberlain v. Pac. Wool G. Co.*, Feb. 1st, 1880, 5 Pac. C. L. J. 2; stipulation, 51 Cal. 629. *Deeds*,

construction and interpretation of, 15 Cal. 21; 17 Cal. 44; 22 Cal. 227; 24 Cal. 136; 25 Cal. 175; 26 Cal. 88; 29 Cal. 407; 41 Cal. 485; 47 Cal. 151, 453; 50 Cal. 171, 422, 485, 532, 613, 655; 51 Cal. 94, 188, 198, 352, 640; 52 Cal. 579, 655; 53 Cal. 135; description in, sec. 2077 and notes; 34 Cal. 334; 50 Cal. 321, 333; 52 Cal. 154, 579; mistake in, *Leonis v. Lazzarovich*, June 4th, 1880, 5 Pac. C. L. J. 492; taxes, for, 50 Cal. 70; 51 Cal. 193; 53 Cal. 666; *Grimm v. O'Connell*, April 7th, 1880, 5 Pac. C. L. J. 294; *Hearst v. Egglestone*, Aug. 18th, 1880. *Generally*, secs. 1856-1866 and notes. *Mortgages*, sec. 744; 51 Cal. 188; 53 Cal. 487. *Powers of attorney*, 47 Cal. 242; 48 Cal. 346; 51 Cal. 198. *Wills*, see CIVIL CODE, secs. 1310, 1317-1351, 1376; 36 Cal. 73; 43 Cal. 165, 568, 643; 49 Cal. 76, 506; 50 Cal. 595.

§ 1860. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

Construction of instruments—sec. 1859*n*.

Surrounding circumstances—may be shown, Civil Code, sec. 1647; 10 Cal. 95, 589; 12 Cal. 148; 13 Cal. 116; 18 Cal. 137; 22 Cal. 150; 25 Cal. 440; 26 Cal. 83; 29 Cal. 299; 33 Cal. 202; 47 Cal. 67; 48 Cal. 165, 369; by parol evidence, 11 Cal. 194; 15 Cal. 21; 22 Cal. 497; 23 Cal. 339; 32 Cal. 11; 50 Cal. 595; usage, sec. 1870, subd. 12; descriptive part of conveyance, sec. 2077; 34 Cal. 334, 624; 36 Cal. 606; 38 Cal. 482.

§ 1861. The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.

Peculiar signification of terms—may be shown, 14 Cal. 23; 34 Cal. 624; 47 Cal. 151; compare Civil Code, secs. 1644, 1645.

§ 1862. When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter.

Compare—Civil Code, sec. 1651.

§ 1863. When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the court, the evidence of persons skilled in deciphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language.

See—sec. 1870, subs. 9, 10, and notes.

§ 1864. When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper,

that is to be taken which is most favorable to the party in whose favor the provision was made.

Compare—Civil Code, secs. 1649, 1654.

§ 1865. A written notice, as well as every other writing, is to be construed according to the ordinary acceptance of its terms. Thus, a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment, and the same refused, and that the holder looks for payment to the person to whom the notice is given.

Ordinary acceptance—see sec. 1861: compare Civil Code, sec. 1644: notice of dishonor, Civil Code, sec. 3143; 4 Cal. 213; 8 Cal. 626; 14 Cal. 160; 24 Cal. 379.

§ 1866. When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted.

§ 1867. None but a material allegation need be proved.

Material allegation—defined, sec. 463: in complaint, see Code, Pleading, sec. 426; 48 Cal. 439: not controverted, sec. 462.

§ 1868. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

Correspondence between evidence and allegations—28 Cal. 67: variance, secs. 469-471: tender cannot be proven unless pleaded, 53 Cal. 597.

Relevant evidence—required, 4 Cal. 229; 21 Cal. 23; 27 Cal. 422; 30 Cal. 252; 48 Cal. 434, 545; *Smith v. East Branch M. Co.*, Feb. 12th, 1880, 4 Pac. C. L. J. 562: admissible evidence under requirement, sec. 1870 and notes: objection or exception to evidence, sec. 646n.

Collateral fact—connecting, sec. 1870 and notes; 51 Cal. 75; *Bancroft v. Heringhi*, Feb. 4th, 1880, 4 Pac. C. L. J. 536: entirely irrelevant, 49 Cal. 374; 52 Cal. 225, 605; 53 Cal. 735: credibility of witness, secs. 1847 and 1870, subd. 16.

§ 1869. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence

of a document, the custody of which belongs to the opposite party.

Affirmative allegations—admitted facts need not be proved. 25 Cal. 225; 35 Cal. 306; 41 Cal. 127, 133; 43 Cal. 225; 47 Cal. 20, 249; affirmative matter in answer unproven, disregarded, 52 Cal. 99; burden of proof, *sec.* 1981; 30 Cal. 662; 31 Cal. 104; 53 Cal. 335; *Dougherty v. Harrison*, March 5th, 1890, 5 Pac. C. L. J. 81; submission on pleadings, 53 Cal. 99; particular allegations to be proven, 31 Cal. 213; 51 Cal. 217; 53 Cal. 713; *Grim v. Barney*, June 30th, 1890, 5 Pac. C. L. J. 590.

Negative allegation—some evidence required, 26 Cal. 611; denials, *sec.* 437n.

SUFFICIENCY OF EVIDENCE IN VARIOUS CASES.

Breach of promise of marriage—*Hanks v. Naglee*, Dec. 26th, 1879, 4 Pac. C. L. J. 456; *Boingneres v. Boulon*, Feb. 7th, 1880, 4 Pac. C. L. J. 528. Carrier—notice of rules of, 22 Cal. 537. Certificate of purchase—*sec.* 1925 and notes; 48 Cal. 126; 50 Cal. 169. Contract—53 Cal. 591. Conversion—23 Cal. 349; 52 Cal. 536; 53 Cal. 20, 21, 261, 399. Corporation—32 Cal. 161; 52 Cal. 192; 53 Cal. 346. Damages—50 Cal. 176, 190; 51 Cal. 195, 260. Divorce—53 Cal. 26. Ejectment—14 Cal. 465, 609; 15 Cal. 289, 361; 16 Cal. 572; 22 Cal. 516, 615; 30 Cal. 200; 35 Cal. 650; 41 Cal. 495; 42 Cal. 231, 402; 44 Cal. 284, 386; 45 Cal. 173, 236; 46 Cal. 258; 48 Cal. 434, 614; 49 Cal. 655; 50 Cal. 200, 211; 51 Cal. 198, 465; 53 Cal. 362. Forcible entry and detainer—48 Cal. 361. Fraud—50 Cal. 285, 349. Generally—degrees of evidence, *sec.* 1823 *et seq.*; proof required, *sec.* 1826; value and effect of evidence, *sec.* 2061. Malicious prosecution—7 Cal. 237; 8 Cal. 217; 29 Cal. 644; 44 Cal. 144; 50 Cal. 206; 51 Cal. 140; 53 Cal. 188. Marriage—*sec.* 1963, subd. 30; 47 Cal. 621; breach of promise of, *see* that head, *supra*. Money paid—action for, 53 Cal. 81; 53 Cal. 616. Negligence—50 Cal. 578, 581; 52 Cal. 602; 53 Cal. 35. Possessory actions—generally, 18 Cal. 136; 24 Cal. 343; 31 Cal. 461; 36 Cal. 561; 47 Cal. 632; 48 Cal. 406, 614; 49 Cal. 202; 52 Cal. 89. Power of attorney—53 Cal. 221. Tax suits—51 Cal. 298, 580. Trespass—50 Cal. 435, 496.

§ 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

1. The precise fact in dispute;
2. The act, declaration, or omission of a party, as evidence against such party;
3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;
4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death;
5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the

scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;

6. After proof of a conspiracy, the act or declaration of a conspirator against his coconspirator, and relating to the conspiracy;

7. The act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty;

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter;

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given;

11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary;

12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation;

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree;

14. The contents of a writing, when oral evidence thereof is admissible;

15. Any other facts from which the facts in issue are presumed or are logically inferable;

16. Such facts as serve to show the credibility of a witness, as explained in section eighteen hundred and forty-seven.

Relevant evidence required—sec. 1868 and notes.

RELEVANT EVIDENCE.

Subd. 1. *Precise fact*—in dispute, kinds of evidence, sec. 1827 and notes. Subd. 2. *Admissions*—account by, 13 Cal. 427; 18 Cal. 634; 34 Cal. 180; 50 Cal. 438; acquiescence, by, see note to subd. 3, *infra*; 13 Cal. 427; 22 Cal. 232; 50 Cal. 438; acknowledgment, by, 22 Cal. 565; assessment, by, 35 Cal. 684; compromise, not by offer to, sec. 2078; counsel, by, 5

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L. J. 227. Conversion—15 Cal. 412; 16 Cal. 82. **Corporation**—50 Cal. 495. **Cross demand**—sec. 440. **Damages**—1 Cal. 354; 5 Cal. 414; 6 Cal. 56, 233; 14 Cal. 454; 18 Cal. 689; 35 Cal. 372. **Debris**—18 Cal. 450. **Escape**—Political Code, sec. 4182. **Exemptions**—15 Cal. 266. **Forcible entry, etc.**—27 Cal. 565; 28 Cal. 532. **Fraud**—7 Cal. 391; 12 Cal. 465; 15 Cal. 50; 23 Cal. 331; 34 Cal. 100; Bancroft v. Heringhi, Feb. 4th, 1880, 4 Pac. C. L. J. 536. **Indorsement**—35 Cal. 121. **Land cases**—ejectment, 4 Cal. 70; 10 Cal. 456; 15 Cal. 283; 21 Cal. 291; 24 Cal. 124; 26 Cal. 310; 28 Cal. 403; 30 Cal. 200, 635; 41 Cal. 263; 44 Cal. 353; 46 Cal. 549; 47 Cal. 181, 263; 48 Cal. 184, 408; 49 Cal. 586; 50 Cal. 64, 142; 53 Cal. 39, 436. **Forcible entry**, 37 Cal. 60; Mexican grant, 29 Cal. 312; Chapman v. Quinn, March 13th, 1880, 5 Pac. C. L. J. 162; mining claims, 36 Cal. 214, 310; possessory actions, generally, 12 Cal. 50; 21 Cal. 298; 23 Cal. 264, 536; 27 Cal. 253; 29 Cal. 412; 36 Cal. 333; 37 Cal. 389; 40 Cal. 249; 43 Cal. 217, 465; 44 Cal. 479; 48 Cal. 178, 346; 50 Cal. 195; public lands, 27 Cal. 87; 28 Cal. 408, 432; 31 Cal. 461; 37 Cal. 389; 47 Cal. 265; 49 Cal. 242; 50 Cal. 64, 195; Chapman v. Quinn, March 13th, 1880, 5 Pac. C. L. J. 162; Knight v. Roche, March 13th, 1880, 5 Pac. C. L. J. 106; quieting title, 28 Cal. 194; 34 Cal. 564; 49 Cal. 374; Wilson v. Madison et al., April 29th, 1880, 5 Pac. C. L. J. 340. **Libel and slander**—sec. 461; 39 Cal. 74; 44 Cal. 641; 51 Cal. 75. **Limitations**—Statute of, 52 Cal. 262. **Malicious prosecution**—18 Cal. 83; 35 Cal. 373; 39 Cal. 485; 44 Cal. 609. **Marriage**—breach of promise of, 47 Cal. 194. **Negligence**—27 Cal. 425; 35 Cal. 247, 534; 36 Cal. 255, 578; 40 Cal. 274; 43 Cal. 437; 44 Cal. 543; 45 Cal. 324; 48 Cal. 426; 50 Cal. 7, 578. **Note**—50 Cal. 162. **Notice**—constructive, 12 Cal. 241. **Services**—action for, 24 Cal. 309; 26 Cal. 305; 42 Cal. 465; 45 Cal. 256; 46 Cal. 42; 50 Cal. 222. **Tax suits**—53 Cal. 233. **Trespass**—45 Cal. 440.

TITLE II.

Of the Kinds and Degrees of Evidence.

- CHAP. I. Knowledge of the court, § 1875.**
- II. Witnesses, §§ 1878-1884.**
- III. Writings, §§ 1887-1951.**
- IV. Material objects presented to the senses, other than writings, § 1954.**
- V. Indirect evidence, §§ 1957-1963.**
- VI. Indispensable evidence, §§ 1967-1974.**
- VII. Conclusive and unanswerable evidence, § 1978.**

CHAPTER I.

KNOWLEDGE OF THE COURT.

§ 1875. Certain facts of general notoriety assumed to be true. Specification of such facts.

§ 1875. Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of all legal expressions;
2. Whatever is established by law;
3. Public and private official acts of the legislative, executive, and judicial departments of this State and of the United States;
4. The seals of all the courts of this State and of the United States;
5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States;
6. The existence, title, national flag, and seal of every State or sovereign recognized by the executive power of the United States;
7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;
8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference.

JUDICIAL NOTICE.

Subd. 1, Meaning of English words and phrases, etc.—41 Cal. 477; 49 Cal. 598; 51 Cal. 429. Subd. 2, Established by law—whatever is, Statutes, 30 Cal. 253; District Courts, before amdts. 1890, 17 Cal. 371; 37 Cal. 241; 42 Cal. 400; 48 Cal. 178. Subd. 3, Official acts of governmental departments—Congressional, 27 Cal. 167; of State Legislature, 43 Cal. 560; 52 Cal. 171; judicial department, before Code, 31 Cal. 229; private acts, before Code, 32 Cal. 447; removal of county seat, 47 Cal. 488. Subd. 4, Seals—patent, 14 Cal. 487. Subd. 5, Chief governmental officers—incumbency, signatures, seals: before Code, 15 Cal. 53; 32 Cal. 106. Subd. 8, Laws of nature, etc.—geographical divisions, 1 Cal. 9; 5 Cal. 140; 39 Cal. 40; streets of city, *Whiting v. Quackenbush*, March 13th, 1880, 5 Pac. C. L. J. 153. Books and documents—as aid see sec. 1936.

CHAPTER II. WITNESSES.

- § 1878. Witnesses defined.
- § 1879. All persons capable of perceptions and communication may be witnesses.
- § 1880. Persons who cannot testify.
- § 1881. Persons in certain relations to parties prohibited.
- § 1882. When privileged persons must testify.
- § 1883. Judge or a juror may be witness.
- § 1884. When an interpreter to be sworn.

§ 1878. A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.

Compare—sec. 2002.

Oral examination—sec. 1846: general rules of, sec. 2042 *et seq.*

Deposition—secs. 2019-2038.

Affidavit—secs. 2009-2015.

§ 1879. All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in section eighteen hundred and forty-seven.

Competency of witnesses—no exclusion for religious belief, 17 Cal. 612: nor for nationality or color, 45 Cal. 57: attorney as witness, 49 Cal. 382.

Persons incompetent—to be witnesses, sec. 1880.

§ 1880. The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination;
2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly;
3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator,

upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person. [In effect April 16th, 1880.]

SUBDIVISION 2. Children—10 Cal. 66.

SUBDIVISION 3. Parties to action against executor, etc.—claim, for family allowance, inapplicable to, 52 Cal. 568; applies to nominal parties, 50 Cal. 420; party may testify in behalf of estate, 51 Cal. 618; 53 Cal. 336; depositions, when not admissible, 51 Cal. 101; assignors of parties, included by amdt. 1880; as to any matter, etc., before death, etc., added by amdt. 1880.

§ 1881. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

SUBDIVISION 1. Husband—when may be witness against wife, 53 Cal. 425.

SUBDIVISION 2. Attorney—privileged communications, 5 Cal. 450; 40 Cal. 284; not privileged, 23 Cal. 331; 29 Cal. 48; 38 Cal. 489; strict construction, 36 Cal. 489.

SUBDIVISION 3. Confession to priest—privileged provision inapplicable, Estate of Toomes, April 7th, 1880, 5 Pac. C. L. J. 286.

§ 1882 of the Code of Civil Procedure of the State of California is hereby repealed. [In effect February 28th, 1876.]

§ 1883. The judge himself or any juror may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury.

Justice—2 Cal. 360.

Juror—48 Cal. 90.

§ 1884. When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpoena. Any person so summoned, who fails to attend at the time and place named in the summons, is guilty of a contempt.

Interpreter—short-hand notes of testimony taken through, *People v Lee Fat*, April 8th, 1880, 5 Pac. C. L. J. 282.

Subpoena—sec. 1985 *et seq.*

Contempt—secs. 1209, 1219.

CHAPTER III.

WRITINGS.

ART. I. WRITINGS IN GENERAL.

II. PUBLIC WRITINGS.

III. PRIVATE WRITINGS.

ARTICLE I.

WRITINGS IN GENERAL.

§ 1887. Writings, public and private.

§ 1888. Public writings defined.

§ 1889. All others private.

§ 1887. Writings are of two kinds:

1. Public; and,
2. Private.

§ 1888. Public writings are:

1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this State, of the United States, of a sister State, or of a foreign country;

2. Public records, kept in this State, of private writings.

SUBDIVISION 2. Certified copy from records—as primary evidence, 49 Cal. 210; 52 Cal. 171.

§ 1889. All other writings are private.

ARTICLE II.

PUBLIC WRITINGS.

§ 1892. Every citizen entitled to inspect and copy public writings.

§ 1893. Public officers bound to give copies.

§ 1894. Four kinds of public writings.

§ 1895. Laws, written or unwritten.

§ 1896. Written laws defined.

§ 1897. Constitution and statutes.

§ 1898. Public and private statutes defined.

§ 1899. Unwritten law defined.

§ 1900. Books containing laws presumed to be correct.

§ 1901. Public seal authenticates a law or document.

§ 1902. Other evidence of laws of other States.

§ 1903. Recitals in statutes, how far evidence.

§ 1904. Judicial record defined.

§ 1905. Record, how authenticated as evidence.

§ 1906. Record of a foreign country, how authenticated.

- 1907. Oral evidence of a foreign record.
- 1908. Effect of a judgment upon rights in various *casos*.
- 1909. Effect of other judicial orders, when conclusive.
- 1910. Where parties are to be deemed the same.
- 1911. What deemed adjudged in a judgment.
- 1912. Where sureties bound, principal is also.
- 1913. Record of another State, its effect.
- 1914. Record of a court of admiralty.
- 1915. Effect of a foreign judgment.
- 1916. Manner of impeaching a record.
- 1917. The jurisdiction necessary in a judgment.
- 1918. Manner of proving other official documents.
- 1919. Public record of private writing evidence.
- 1920. Entries in official books primary evidence.
- 1921. Justice's judgment in other States, how proved.
- 1922. Same.
- 1923. Contents of other official certificates.
- 1924. Provisions in relation to States apply to Territories.
- 1925. Certificates of purchase primary evidence of ownership.
- 1926. Entries made by officers or boards primary evidence.

§ 1892. Every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute.

Public records, etc., open to inspection—Political Code, sec. 1032.

§ 1893. Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing. [In effect July 1st, 1874.]

Certified copy—from records, as primary evidence, 49 Cal. 210.

§ 1894. Public writings are divided into four classes:

1. Laws;
2. Judicial records;
3. Other official documents;
4. Public records, kept in this State, of private writings.

§ 1895. Laws, whether organic or ordinary, are either written or unwritten.

§ 1896. A written law is that which is promulgated in writing, and of which a record is in existence.

§ 1897. The organic law is the constitution of government, and is altogether written. Other written laws are denominated statutes. The written law of this State is therefore contained in its Constitution and statutes, and in the Constitution and statutes of the United States.

§ 1898. Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other

statutes are public, in which are included statutes creating or affecting corporations.

§ 1899. Unwritten law is the law not promulgated and recorded, as mentioned in section eighteen hundred and ninety-six, but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts and the treatises of learned men.

§ 1900. Books printed or published under the authority of a sister State or foreign country, and purporting to contain the statutes, code, or other written law of such State or country, or proved to be commonly admitted in the tribunals of such State or country, as evidence of the written law thereof, are admissible in this State as evidence of such law.

Books—historical, etc., sec. 1936: resort to, sec. 1875: authority of, sec. 1963, subd. 35, 36.

Sister State—scope of expression, sec. 1924.

§ 1901. A copy of the written law or other public writing of any State or country, attested by the certificate of the officer having charge of the original, under the public seal of the State or country, is admissible as evidence of such law or writing. [In effect July 1st, 1874.]

Certificate—requisites of, sec. 1922.

§ 1902. The oral testimony of witnesses, skilled therein, is admissible as evidence of the unwritten law of a sister State or foreign country, as are also printed and published books of reports of decisions of the courts of such State or country, or proved to be commonly admitted in such courts.

See—sec. 1900n.

§ 1903. The recitals in a public statute are conclusive evidence of the facts recited, for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.

Recitals—in written instrument, sec. 1962, subd. 2.

§ 1904. A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding.

Judicial records—judgment roll, sec. 670: papers in insolvency, 18 Cal. 41: execution book as evidence, sec. 683: swamp land papers, certified copies admissible, 52 Cal. 171.

PENAL APPENDIX.—36.

§ 1905. A judicial record of this State, or of the United States, may be proved by the production of the original, or by a copy thereof certified by the clerk or other person having the legal custody thereof. That of a sister State may be proved by the attestation of the clerk, and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

Judicial record of this State, etc.—need of seal, sec. 153, subd. 3: appointment of executor, etc., sec. 1429: judgment roll, when needs no exemplification, 47 Cal. 21.

Judicial record of a sister State—U. S. Const. art. 4, sec. 1; 1 Cal. 428; 7 Cal. 247; 12 Cal. 181: of United States as to lands, 18 Cal. 416.

Certificate—sec. 1923.

§ 1906. A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge, or presiding magistrate, that the person making the attestation is the clerk of the court, or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country. [In effect July 1st, 1874.]

Foreign judgment—39 Cal. 646.

Certificate—sec. 1923.

§ 1907. A copy of the judicial record of a foreign country is also admissible in evidence, upon proof—

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;

2. That such original was in the custody of the clerk of the court, or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

§ 1908. The effect of a judgment or final order in an action or special proceeding before a court or judge of this

State, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person;

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice actual or constructive, of the pendency of the action or proceeding. [In effect July 1st, 1874.]

ESTOPPEL BY RECORD.

Judgment—or order: *Finality*, defined, 33 Cal. 474; required, 24 Cal. 466; 37 Cal. 236; where action dismissed, 21 Cal. 164; where appeal taken, 13 Cal. 634; what not *res adjudicata*, 44 Cal. 635. *Estoppel*, generally, 31 Cal. 148; 32 Cal. 176; 36 Cal. 231; 37 Cal. 236; 51 Cal. 368; must be pleaded or proven, sec. 1963, subd. 6; 23 Cal. 354; 24 Cal. 78; 30 Cal. 630; 36 Cal. 626; 47 Cal. 21; waiver of, 42 Cal. 619; records of Board of Supervisors, 47 Cal. 47; in equity suit, 39 Cal. 482; 48 Cal. 386; dismissal by consent is bar, 47 Cal. 542.

Jurisdiction—generally, see sec. 33*n*, sec. 1917; impeaching judicial record for want of, sec. 1916; presumed on collateral attack, sec. 412*n*; 5 Cal. 64; 7 Cal. 279; 12 Cal. 133, 275; 14 Cal. 668; 16 Cal. 72, 389; 23 Cal. 101; 24 Cal. 190; 33 Cal. 683; 34 Cal. 391, 615; 35 Cal. 528; 37 Cal. 458; 39 Cal. 439; 41 Cal. 82; 44 Cal. 623; 45 Cal. 455, 543; 46 Cal. 656; 49 Cal. 208, 233, 374; 50 Cal. 203; 51 Cal. 615; *Linchan v. Hathaway*, March 3d, 1880, 5 Pac. C. L. J. 90; but see 53 Cal. 635; otherwise of inferior Courts, 12 Cal. 286; 23 Cal. 404; 34 Cal. 326; but see 52 Cal. 171.

SUBDIVISION 1. Probate or administration—collateral attack on proceedings, 4 Cal. 313; 18 Cal. 480, 503; 20 Cal. 273; 28 Cal. 182; 33 Cal. 46; conclusiveness of proceedings, sec. 1333; 6 Cal. 669; 18 Cal. 430; 23 Cal. 363; 25 Cal. 223; 29 Cal. 521; 32 Cal. 120; 44 Cal. 370; 45 Cal. 95; 48 Cal. 366; 53 Cal. 680. Legal condition of person—insolvent, 34 Cal. 18; 40 Cal. 425; estoppel, by not making defense in ejectment, 43 Cal. 210. Title settled by judgment—ejectment in, 14 Cal. 463, 545; 18 Cal. 111; 26 Cal. 126; 27 Cal. 168; 28 Cal. 156; 30 Cal. 309, 634; 32 Cal. 176; 37 Cal. 389; 41 Cal. 42; 45 Cal. 231, 593; 48 Cal. 601; 49 Cal. 325; 50 Cal. 171; forcible entry and detainer, in, 23 Cal. 381; 30 Cal. 634; foreclosure of, 14 Cal. 634; 24 Cal. 603; 37 Cal. 236; and see 53 Cal. 657; generally, 31 Cal. 148; 32 Cal. 197; 37 Cal. 396; 33 Cal. 262, 586; 40 Cal. 282; 47 Cal. 461; 49 Cal. 525; 51 Cal. 505; land department of, see Mexican grant, and 52 Cal. 424; Mexican grant, as to, 14 Cal. 545; 27 Cal. 168; 32 Cal. 365; 33 Cal. 448; 49 Cal. 325, 473; partner, against, 49 Cal. 124; quieting title, 23 Cal. 409; replevin in, 10 Cal. 520; riparian rights, determining, 53 Cal. 469; subsequent title not affected, 26 Cal. 513; 32 Cal. 409; 35 Cal. 316; trespass by partners, 14 Cal. 223; trespass *quare clausum fregit*, 43 Cal. 65; where *lis pendens* filed, 23 Cal. 335; 28 Cal. 194.

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erally, 23 Cal. 373; 30 Cal. 309; 36 Cal. 231: issues tried, limit estoppel, 36 Cal. 28; 38 Cal. 647; merits not passed on, 25 Cal. 271; 43 Cal. 597; 45 Cal. 128: misjoinder, where, 27 Cal. 287: motion to set aside judgment, when no bar, 45 Cal. 617: questions involved, determine estoppel, 43 Cal. 311: recital in judgment, 44 Cal. 623: same cause of action, 42 Cal. 372; Ladd v. Durkin, March 18th, 1880, 5 Pac. C. L. J. 186; De La Guerra v. Newhall, May 15th, 1880, 5 Pac. C. L. J. 413: serious offense, effect of conviction of, 10 Cal. 391: stipulation, where, 43 Cal. 485; 45 Cal. 405: tenant, judgment against, when landlord not barred by, Altschul v. Doyle, etc., March 17th, 1880, 5 Pac. C. L. J. 136: verdict, estoppel by, 5 Cal. 81; 7 Cal. 252; 15 Cal. 145, 182, 425; 20 Cal. 448, 486; 41 Cal. 221; 44 Cal. 294. Parties and privies—sec. 1910: alone estopped, 9 Cal. 130; 14 Cal. 207; 23 Cal. 354; 30 Cal. 229; 40 Cal. 249: application to particular cases, 12 Cal. 140; 24 Cal. 502; 34 Cal. 62; 39 Cal. 224; 44 Cal. 46; 45 Cal. 439; 48 Cal. 386; 49 Cal. 213, 243; 50 Cal. 172, 655; 51 Cal. 473; Altschul v. Doyle, etc., March 17th, 1880, 5 Pac. C. L. J. 136. Estoppels in various cases—counter-claim barred by not pleading, sec. 439: fictitious name, where used, 50 Cal. 205, 583: partition, conclusiveness of judgment in, sec. 766: 53 Cal. 362: Probate Court decree, see JUDGMENT, note *supra*, and Noe v. Spivale, Feb. 26th, 1880; Reynolds v. Brumagin, March 4th, 1880, 5 Pac. C. L. J. 115: sureties, sec. 1912.

§ 1909. Other judicial orders of a court or judge of this State, or of the United States, create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.

Disputable presumptions—see sec. 1963 and notes.

Parties and privies—see sec. 1908, subd. 2ⁿ, sec. 1910.

§ 1910. The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either.

Other parties—49 Cal. 213.

§ 1911. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

See matter directly adjudged—note to sec. 1908, subd. 2.

§ 1912. Whenever, pursuant to the last four sections, a party is bound by a record, and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceeding, and an opportunity at the surety's request to join in the defense.

Suit by surety against principal—16 Cal. 69.

§ 1913. The effect of a judicial record of a sister State is the same in this State as in the State where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority.

Judgment obtained in another State—by publication of summons, 8 Cal. 449.

§ 1914. The effect of the judicial record of a court of admiralty of a foreign country is the same as if it were the record of a court of admiralty of the United States.

§ 1915. The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment, is as follows:

1. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing;

2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

§ 1916. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.

Judicial record, impeaching—not for error, 32 Cal. 176; by infant, 31 Cal. 273; by showing alteration, 50 Cal. 448; by collateral attack, 49 Cal. 208; for want of jurisdiction, see sec. 1917 and note; 7 Cal. 54, 443; 8 Cal. 562; 27 Cal. 300; 30 Cal. 439.

§ 1917. The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.

Jurisdiction—generally, see note to sec. 33; also sec. 1908 and note; of defendant sued by fictitious name, 50 Cal. 203; of court not of record, on collateral attack, 52 Cal. 171.

§ 1918. Other official documents may be proved as follows:

1. Acts of the executive of this State, by the records of the State Department of the State; and of the United States, by the records of the State Department of the United States, certified by the heads of those departments respectively. They may also be proved by public docu-

ments printed by the order of the Legislature or Congress, or either house thereof;

2. The proceedings of the Legislature of this State or of Congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order;

3. The acts of the executive, or the proceedings of the legislature of a sister State, in the same manner;

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States;

5. Acts of a municipal corporation of this State, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such corporation;

6. Documents of any other class in this State, by the original, or by a copy, certified by the legal keeper thereof;

7. Documents of any other class in a sister State, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such State, that the copy is duly certified by the officer having the legal custody of the original;

8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate, under seal of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original;

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof. [In effect July 1st, 1874.]

OFFICIAL DOCUMENTS.

SUBDIVISION 5. Municipal corporation—48 Cal. 143.

SUBDIVISION 6. Certified copy—of documents in this State: alcalde grants, 21 Cal. 202: certificate, sec. 1923: street assessments, certificate to record, 44 Cal. 213: swamp land papers, 52 Cal. 171.

SUBDIVISION 7. Documents in another State—scope of term "sister State," sec. 1924: in land department of United States, 14 Cal. 544; 18 Cal. 416; 19 Cal. 87; 40 Cal. 358.

§ 1919. A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

Public record of a private writing—certified copy of: alcalde grants, 31 Cal. 500: deed, 49 Cal. 212: expedients of Mexican grant, 51 Cal. 590: patent, 50 Cal. 346: power of attorney, 51 Cal. 198: railroads, articles of consolidation, 50 Cal. 346.

§ 1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts stated therein. [In effect July 1st, 1874.]

Official documents—proof of, sec. 1918.

Entries in performance of public duty—6 Cal. 674; 31 Cal. 140, 500; 35 Cal. 521: by officer or board of officers, etc., sec. 1926.

§ 1921. A transcript from the record or docket of a justice of the peace of a sister State, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

§ 1922. There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas or county court thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings, and jurisdiction may also be proved by the justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness.

§ 1923. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court. [In effect July 1st, 1874.]

§ 1924. The provisions of the preceding sections of this article applicable to the public writings of a sister State, are equally applicable to the public writings of the United States or a Territory of the United States. [In effect July 1st, 1874.]

§ 1925. A certificate of purchase or of location of any lands in this State, issued or made in pursuance of any law of the United States or of this State, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

Certificate of purchase—adverse possession, defendant claiming, 51 Cal. 412: annulment of, 50 Cal. 84; 51 Cal. 128: effect of, 51 Cal. 41; 52 Cal. 521: evidence against, 50 Cal. 211: evidence as, 48 Cal. 26: insufficient proof of title, when, 51 Cal. 534: judgment on, when no bar, 51 Cal. 505: mortgagee, where junior, 53 Cal. 649: premature, Pollard v. Putnam, April 23rd, 1880, 5 Pac. C. L. J. 423: *prima facie* title by, 50 Cal. 195; 52 Cal. 244: proof of existence, and of preliminary steps, 50 Cal. 169: requisites, 51 Cal. 128: scope of, 52 Cal. 521: suspension of, 47 Cal. 461; 52 Cal. 521.

§ 1926. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is *prima facie* evidence of the facts stated in such entry. [In effect July 1st, 1874.]

Board—of commissioners, report as evidence, 49 Cal. 229.

ARTICLE III.

PRIVATE WRITINGS.

- 1929. Private writings classified.
- 1930. Seal defined.
- 1931. Manner of making it.
- 1932. Effect of a seal.
- 1933. Execution of an instrument defined.
- 1934. Compromise of a debt without seal good.
- 1935. Subscribing witness defined.
- 1936. Books, maps, etc., how far evidence.
- 1937. Original writing to be produced or accounted for.
- 1938. When in possession of adverse party, notice to be given.
- 1939. Writings called for and inspected may be withheld.
- 1940. Where there is a subscribing witness, the proof.
- 1941. Other witnesses may also testify.
- 1942. When evidence of execution not necessary.
- 1943. Evidence of handwriting.
- 1944. Allowed by comparison.
- 1945. Same.
- 1946. Entries of decedent's evidence in specified cases.

- § 1947. Copies of entries also allowed.
- § 1948. Private writings acknowledged and certified.
- § 1949. County clerks to keep private papers deposited.
- § 1950. Public records not to be carried about.

§ 1929. Private writings are either—

1. Sealed; or,
2. Unsealed.

No distinction—between sealed and unsealed writings, sec. 1932.

§ 1930. A seal is a particular sign, made to attest in the most formal manner, the execution of an instrument. Seal generally—sec. 14 and notes: requisite, sec. 1931.

§ 1931. A public seal in this State is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister State or foreign country, and there recognized as a seal, must be so regarded in this State. [In effect July 1st, 1874.]

Scope of word "seal"—sec. 14.

Impression of seal—Civil Code, sec. 1628; 5 Cal. 220, 315.

Seal of corporation—22 Cal. 156; 52 Cal. 192.

Seals of courts—secs. 147-153.

§ 1932. There shall be no difference hereafter, in this State, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged, by a writing not under seal. [In effect July 1st, 1874.]

Corresponding provision—see Civil Code, sec. 1629.

Before distinction abolished—13 Cal. 220, 510; 15 Cal. 363; 16 Cal. 165; impeaching consideration of sealed instrument, 6 Cal. 134, 664; 10 Cal. 461; 12 Cal. 286; 13 Cal. 36; 14 Cal. 19.

Agreement of composition—requires no seal, sec. 1934.

Under Mexican system—no distinction, sec. 147.

§ 1933. The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.

Execution of instrument—subscribing, 28 Cal. 157; 29 Cal. 352; 49 Cal. 192; 51 Cal. 404, 473; delivering, 5 Cal. 319; 13 Cal. 502; 51 Cal. 573; effect of seal, before distinction abolished, 16 Cal. 594.

§ 1934. An agreement in writing without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed.

§ 1935. A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness.

§ 1936. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are *prima facie* evidence of facts of general notoriety and interest. [In effect July 1st, 1874.]

Books—as aid to court, sec. 1875: as evidence, sec. 1900: presumptions as to, sec. 1963, subds. 35, 36.

§ 1937. The original writing must be produced and proved, except as provided in sections eighteen hundred and fifty-five and nineteen hundred and nineteen. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, as provided in section eighteen hundred and fifty-five.

Evidence of contents of instrument—lost deed, 49 Cal. 263: proof before, 3 Cal. 427; 49 Cal. 653.

§ 1938. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.

Document in possession—of opponent, sec. 1855, subd. 2 and note.

§ 1939. Though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case.

§ 1940. Any writing may be proved either:

1. By any one who saw the writing executed; or,
2. By evidence of the genuineness of the handwriting of the maker; or,
3. By a subscribing witness. [In effect July 1st, 1874.]

Proof of execution of writing—by admission, sec. 1942.

SUBDIVISION 2. Proof of handwriting—secs. 1943.

SUBDIVISION 3. Subscribing witness—sec. 1935; 3 Cal. 427; 13 Cal. 306, 426; 14 Cal. 18; 26 Cal. 393; 27 Cal. 238: other evidence of execution, when admissible, sec. 1941: on contest of will, sec. 1315.

§ 1941. If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence.

§ 1942. Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one mentioned in section nineteen hundred and forty-five, or one produced from the custody of the adverse party, and has been acted upon by him as genuine.

§ 1943. The handwriting of a person may be proved by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting.

Comparison of handwriting—47 Cal. 294: experts, 50 Cal. 462.

§ 1944. Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge. [In effect July 1st, 1874.]

§ 1945. Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.

Presumption—that ancient writing is genuine, sec. 1963, subd. 34.

§ 1946. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as *prima facie* evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interest of the person making it;
2. When it was made in a professional capacity, and in the ordinary course of professional conduct;
3. When it was made in the performance of a duty specially enjoined by law. [In effect July 1st, 1874.]

Entries in books—repeated, sec. 1947: as evidence in favor of party making them, 2 Cal. 172; 7 Cal. 186; 14 Cal. 573; 17 Cal. 58, 466: of alleged partnership, 23 Cal. 511; 49 Cal. 105: where alteration, sec. 1963: 17 Cal. 324.

§ 1947. When an entry is repeated in the regular course of business, one being copied from another at or

near the time of the transaction, all the entries are equally regarded as originals.

Entry copied—from slate, 14 Cal. 573.

§ 1948. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment of proof of conveyances of real property, and the certificate of such acknowledgment or proof is *prima facie* evidence of the execution of the writing in the same manner as if it were a conveyance of real property. [In effect July 1st, 1874.]

Conveyance of real property—as evidence, sec. 1951.

§ 1949 of said Code is repealed. [In effect July 1st, 1874.]

§ 1950. The record of a conveyance of real property, or any other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court, in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the court is held in the same building with such office. [In effect July 1st, 1874.]

§ 1951. Every instrument conveying or affecting real property, acknowledged, or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence, in an action or proceeding, without further proof; and a certified copy of the record of such conveyance or instrument thus acknowledged or proved may also be read in evidence, with the like effect as the original, on proof, by affidavit, or otherwise, that the original is not in the possession or under the control of the party producing the certified copy. [In effect July 1st, 1874.]

Certified copies of conveyances—when admissible, 25 Cal. 129; 37 Cal. 50, 238; 38 Cal. 216, 449.

CHAPTER IV.

MATERIAL OBJECTS PRESENTED TO THE SENSES, OTHER THAN WRITINGS.

§ 1954. Material objects.

• § 1954. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, or character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court.

Material objects—blood-spots provable by witnesses, 49 Cal. 485.

CHAPTER V.

INDIRECT EVIDENCE, INFERENCES, AND PRESUMPTIONS.

- 1957. Indirect evidence classified.
- 1958. Inference defined.
- 1959. Presumption defined.
- 1960. When an inference arises.
- 1961. Presumptions may be controverted, when.
- 1962. Specification of conclusive presumptions.
- 1963. All other presumptions may be controverted.

§ 1957. Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions.

§ 1958. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

§ 1959. A presumption is a deduction which the law expressly directs to be made from particular facts.

§ 1960. An inference must be founded—

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

PENAL APPENDIX.—57.

§ 1961. A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption.

§ 1962. The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another.

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.

3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.

4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.

6. The judgment or order of a court, when declared by this Code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence.

7. Any other presumption which, by statute, is expressly made conclusive.

ESTOPPEL.

SUBDIVISION 1. Malicious intent—in libel, 47 Cal. 252.

SUBDIVISION 2. Recitals—in written instruments, bill of sale in, 3 Cal. 713; consideration, when impeachable, 6 Cal. 134; 13 Cal. 43; 21 Cal. 47; 23 Cal. 472; 26 Cal. 79, 455; 27 Cal. 119; 30 Cal. 11; 36 Cal. 362; 40 Cal. 610; 48 Cal. 634; but see 31 Cal. 471; 36 Cal. 469; *Main v. Hilton*, Feb. 24, 1880, 4 Pac. C. L. J. 506; conflicting patents, 34 Cal. 506; 44 Cal. 13; deeds in, 3 Cal. 263; 6 Cal. 149; 12 Cal. 20, 315; 14 Cal. 612; 22 Cal. 112; 28 Cal. 175; 30 Cal. 560; 50 Cal. 503; and see quitclaim deeds; execution, purchase on, 22 Cal. 224; 31 Cal. 591; fraud in deed, patent, etc., 6 Cal. 665; 21 Cal. 220; 44 Cal. 563; grantee may deny grantor's title, extent of doctrine, 13 Cal. 494; 14 Cal. 472; 16 Cal. 100; 18 Cal. 465; insurance policy, acknowledgment of premium, Civil Code, sec. 2598; limits of presumption, 6 Cal. 149; 13 Cal. 477; and see consideration; Mexican grant, impeaching, 48 Cal. 339; mortgage as, 48 Cal. 572; mortgagor of fee, estoppel of, 13 Cal. 538; 31 Cal. 457; municipality, deed of, 22 Cal. 257; parties and privies, alone estopped, 16 Cal. 100; 36 Cal. 505; patent, 49 Cal. 213, 331; and see conflicting patents, fraud, State patent, United States patent; pleadings, supplementary, in, 48 Cal. 346; pre-emption claimant, 60 Cal. 196; quit-claim deeds, 14 Cal. 472; 18 Cal. 465; 30 Cal.

34; 33 Cal. 288; 38 Cal. 90; 41 Cal. 63; 42 Cal. 175; 44 Cal. 330, 353; 50 Cal. 332; State patent, 28 Cal. 100; 31 Cal. 461; 34 Cal. 580; 47 Cal. 181; 50 Cal. 143; street contract in, 52 Cal. 270; tax deeds in, 53 Cal. 213; United States patent, 14 Cal. 467; 15 Cal. 366; 16 Cal. 229, 324; 17 Cal. 225, 259; 20 Cal. 150, 412; 22 Cal. 111, 480; 29 Cal. 311; 45 Cal. 538; 48 Cal. 345; 49 Cal. 334.

SUBDIVISION 3. Estoppel in pais—absent, when, 3 Cal. 400; 6 Cal. 263, 531; 10 Cal. 90, 172, 589; 13 Cal. 494; 17 Cal. 401; 22 Cal. 468; 24 Cal. 268; 25 Cal. 147; 26 Cal. 23; 28 Cal. 175; 31 Cal. 218; 36 Cal. 535; 37 Cal. 40; 38 Cal. 119, 300, 428; 40 Cal. 429; 43 Cal. 526, 537; acquiescence, generally, 49 Cal. 314; 50 Cal. 438; 51 Cal. 275; *Salter v. Baker*, Feb. 6th, 1880, 4 Pac. C. L. J. 543; acquiescence in location of division fence, 9 Cal. 600; 25 Cal. 619; 48 Cal. 395; 50 Cal. 295; 51 Cal. 362; agreed survey, when none by, 52 Cal. 442; certiorari on, 47 Cal. 222; certificate of purchase by, 52 Cal. 244; corporation of, 50 Cal. 353; deception, liability for, Civil Code, sec. 1709; 2 Cal. 270, 491; 4 Cal. 300; 8 Cal. 117; 14 Cal. 367; 26 Cal. 40; 31 Cal. 153, 218; *Fishbeck v. Phoenix Ins. Co.*, March 24th, 1880, 5 Pac. C. L. J. 212; dedication of streets, 22 Cal. 488; 35 Cal. 490; defendant, additional, as to, 50 Cal. 258; equitable, 10 Cal. 158; 19 Cal. 660; 24 Cal. 114, 127; 25 Cal. 596; 44 Cal. 162; exists, when, 2 Cal. 489; 3 Cal. 302; 4 Cal. 97, 309; 5 Cal. 84, 366; 6 Cal. 607; 7 Cal. 551; 8 Cal. 27, 77, 113, 303, 461; 9 Cal. 204, 600; 10 Cal. 172; 12 Cal. 148; 13 Cal. 359; 14 Cal. 279; 16 Cal. 345, 591; 23 Cal. 11; 24 Cal. 268; 25 Cal. 545, 593; 26 Cal. 23; 30 Cal. 408; 31 Cal. 148; 36 Cal. 94; 38 Cal. 300; guardian of, 32 Cal. 119; partnership, as to books of, 49 Cal. 105; pleadings, by, 12 Cal. 191; 27 Cal. 228; 30 Cal. 360; 37 Cal. 34; 49 Cal. 414; pledgor of, 30 Cal. 377; receptor of, 10 Cal. 172; 45 Cal. 223; silence as, 10 Cal. 631, and see **ACQUIESCENCE; stipulation by, 51 Cal. 629; 53 Cal. 680; subsequent purchaser, when none for, 52 Cal. 579; waiver, where, 22 Cal. 580; 53 Cal. 135.**

SUBDIVISION 4. Tenant's denial of landlord's title—rule against, 2 Cal. 558; 6 Cal. 197; 8 Cal. 398, 581; 9 Cal. 575; 11 Cal. 133; 12 Cal. 290; 16 Cal. 89; 27 Cal. 105; 44 Cal. 515; 47 Cal. 474; 50 Cal. 250; exceptions, 21 Cal. 309; 29 Cal. 168; 30 Cal. 201; 33 Cal. 237; 35 Cal. 558; justification, see **EXCEPTIONS, and 34 Cal. 265; 36 Cal. 307; 37 Cal. 389; 38 Cal. 262; 44 Cal. 508; 45 Cal. 594; 47 Cal. 459, 474; 49 Cal. 202; proof of relation, 30 Cal. 544; rule inapplicable, 38 Cal. 122.**

SUBDIVISION 5. Legitimacy of issue—compare sec. 1963, subd. 31.

SUBDIVISION 6. Judgment or order—when conclusive, see sec. 1906; 14 Cal. 634; 23 Cal. 354, 373; 27 Cal. 228; 30 Cal. 229, 301, 309, 360, 630; 31 Cal. 148; 32 Cal. 176; 33 Cal. 74, 448; 34 Cal. 265; 36 Cal. 28, 230, 489; 37 Cal. 236, 389; 38 Cal. 259, 590; 39 Cal. 473; 40 Cal. 246, 281, 294; 41 Cal. 221, 232, 298; 42 Cal. 368; 43 Cal. 86, 210, 306; 44 Cal. 292; 45 Cal. 128, 439, 485.

SUBDIVISION 7. Other estoppels—alcalde grant, as to, 1 Cal. 295; conclusive evidence, generally, sec. 1978; 45 Cal. 644; infants, none against, 25 Cal. 153; notice in probate matters, secs. 1376, 1638; probate of will, sec. 1333; survey, governmental, when by, 49 Cal. 473.

§ 1963. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong.
2. That an unlawful act was done with an unlawful intent.
3. That a person intends the ordinary consequence of his voluntary act.

4. That a person takes ordinary care of his own concerns.

5. That evidence willfully suppressed would be adverse if produced.

6. That higher evidence would be adverse from inferior being produced.

7. That money paid by one to another was due to the latter.

8. That a thing delivered by one to another belonged to the latter.

9. That an obligation delivered up to the debtor has been paid.

10. That former rent or installments have been paid when a receipt for latter is produced.

11. That things which a person possesses are owned by him.

12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership.

13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly.

14. That a person acting in a public office was regularly appointed to it.

15. That official duty has been regularly performed.

16. That a court or judge, acting as such, whether in this State or any other State or country, was acting in the lawful exercise of his jurisdiction.

17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.

18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them.

19. That private transactions have been fair and regular.

20. That the ordinary course of business has been followed.

21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration.

22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill.

23. That a writing is truly dated.

24. That a letter duly directed and mailed was received in the regular course of the mail.

25. Identity of person from identity of name.

26. That a person not heard from in seven years is dead.

27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.

28. That things have happened according to the ordinary course of nature and the ordinary habits of life.

29. That persons acting as copartners have entered into contract of copartnership.

30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.

32. That a thing once proved to exist continues as long as is usual with things of that nature.

33. That the law has been obeyed.

34. That a document or writing more than thirty years old, is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published.

36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published, contains correct reports of such cases.

37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest.

38. The uninterrupted use by the public of land for a burial ground, for five years, with the consent of the owner and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose.

39. That there was a good and sufficient consideration for a written contract.

40. When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules:

First.—If both of those who have perished were under the age of fifteen years, the older is presumed to have survived.

Second.—If both were above the age of sixty, the younger is presumed to have survived.

Third.—If one be under fifteen and the other above sixty, the former is presumed to have survived.

Fourth.—If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived. If the sexes be the same, then the older.

Fifth.—If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived.

Presumptions—when raised, 21 Cal. 456: of knowledge of the law, 50 Cal. 337: rebutting, 52 Cal. 650: where two equally reasonable, 6 Cal. 630.

DISPUTABLE PRESUMPTIONS.

SUBDIVISION 1. Innocence—of crime or wrong, evidence required to overcome, see sec. 2061, subd. 5.

SUBDIVISION 6. Higher evidence adverse—see sec. 2061, subd. 7.

SUBDIVISION 8. Thing delivered, etc.—deed, 49 Cal. 374.

SUBDIVISION 11. Title from possession—presumption of: *Real property*, 4 Cal. 33, 67, 79, 94, 278, 308; 5 Cal. 42, 87, 250, 486; 6 Cal. 108, 145, 173, 649; 7 Cal. 152, 262; 8 Cal. 143, 323, 467, 603; 9 Cal. 1, 63, 427, 589; 10 Cal. 181, 230, 233; 11 Cal. 153; 12 Cal. 291, 560; 13 Cal. 38, 166, 562; 15 Cal. 46, 143; 17 Cal. 43, 107, 271; 18 Cal. 199; 19 Cal. 625; 20 Cal. 209; 21 Cal. 305, 324, 381, 423, 453, 610; 23 Cal. 221, 576; 24 Cal. 279; 25 Cal. 25, 509; 27 Cal. 73; 28 Cal. 202; 29 Cal. 206, 490; 30 Cal. 355, 408; 31 Cal. 183, 418; 32 Cal. 310, 668; 36 Cal. 271, 333; 37 Cal. 101; 43 Cal. 371, 455; 44 Cal. 618, 699; 45 Cal. 101, 281; 49 Cal. 523. *Personal property*, 2 Cal. 370; 5 Cal. 460; 8 Cal. 613; 9 Cal. 246; 19 Cal. 64; 31 Cal. 649. *Possession requisite*, what constitutes, cotenant, by, 23 Cal. 247, 376; ejectment, in, 13 Cal. 592; 45 Cal. 101, and see **REAL PROPERTY**, *supra*; servant by, 8 Cal. 617; tenant by, 34 Cal. 91; timber, of, 12 Cal. 316.

SUBDIVISION 14. Officer deemed regularly appointed—3 Cal. 453; 5 Cal. 389; 6 Cal. 215; 16 Cal. 552; 24 Cal. 121; 53 Cal. 29.

SUBDIVISIONS 15 and 16. Regular performance of official and judicial duty—1 Cal. 323; 3 Cal. 27, 192; 5 Cal. 53; 6 Cal. 81; 9 Cal. 554; 16 Cal. 227, 231; 28 Cal. 133; 47 Cal. 43, 222, 294; 48 Cal. 136, 434, 683; 49 Cal. 229, 679; 50 Cal. 360; 51 Cal. 55, 146, 298, 447; 52 Cal. 171, 338, 664; 53 Cal. 239, 420; *Dougherty v. Harrison*, March 5th, 1880, 5 Pac. C. L. J. 81; *La Soc. Française, etc. v. Beard*, March 31st, 1880, 5 Pac. C. L. J. 273.

SUBDIVISION 16. Jurisdiction—sec. 33*n*.

SUBDIVISION 17. Judicial record correct—48 Cal. 133, 49 Cal. 132, 229; 51 Cal. 219, 298, 447; 52 Cal. 338, 664; 53 Cal. 239, 635.

SUBDIVISION 20. Ordinary course of business followed—sec. 1960, subd. 2; 47 Cal. 294.

SUBDIVISION 21. Promissory note, etc., imports consideration—see subd. 39 of this section, and Civil Code, secs. 1614, 1615; 9 Cal. 247; 10 Cal. 461; 34 Cal. 138.

SUBDIVISION 23. Writing truly dated—deed, 47 Cal. 171.

SUBDIVISION 25. Identity—1 Cal. 428; 16 Cal. 554; 25 Cal. 78; 28 Cal. 218, 219; 29 Cal. 514; 46 Cal. 49.

SUBDIVISION 26. Death of person—not heard from in seven years, 8 Cal. 62; 38 Cal. 223.

- SUBDIVISION 29. Copartners—29 Cal. 257; 49 Cal. 344.
 SUBDIVISION 30. Marriage—Civil Code, secs. 68-78; 10 Cal. 537; 26 Cal. 132; 47 Cal. 621; 52 Cal. 608.
 SUBDIVISION 31. Legitimacy—13 Cal. 101.
 SUBDIVISION 33. Law obeyed—51 Cal. 210.
 SUBDIVISION 36. Foreign laws—21 Cal. 226; 32 Cal. 60.
 SUBDIVISION 39. Consideration of contract—see subd. 21, note.

PRESUMPTIONS IN VARIOUS CASES.

Adultery—41 Cal. 107. Ancient writing—when deemed genuine, sec. 1963, subd. 34. Authenticity of book—when presumed, sec. 1963, subd. 35. Burial ground—dedication to public, sec. 1963, subd. 38. Check—45 Cal. 419. Community property—12 Cal. 251. Conclusive presumptions—sec. 1962 and notes. Continuance—of existing thing, sec. 1963, subd. 32. Contract—consideration for, sec. 1963, subd. 39. Conveyance of executor, etc.—sec. 1961. Date—of writing, correct, sec. 1963, subd. 23 and note: of indorsement, see that head. Disputable presumptions—sec. 1963, and note *supra*. Entire issue, etc.—submitted, sec. 1963, subd. 18. Evidence suppressed—would be adverse, sec. 1963, subd. 5. Execution of—conveyance, sec. 1963, subd. 37. Fire department records—Political Code, sec. 3341. Foreign laws—embodied in reports, sec. 1963, subd. 36 and note. Higher evidence—adverse, sec. 1963, subd. 6. Identity—of person from name, sec. 1963, subd. 25 and note. Indorsement—of negotiable paper, deemed made at date, sec. 1963, subd. 22. Innocence—sec. 1963, subd. 1. Jurisdiction—presumed, sec. 1963, subd. 16. Law obeyed—sec. 1963, subd. 33. Legitimacy—sec. 1963, subd. 31 and note. Letters received—in regular course of mail, sec. 1963, subd. 24. Militia fine—Political Code, sec. 1935. Money—paid, was due, sec. 1963, subd. 7: in county treasury, 31 Cal. 74. Negligence—25 Cal. 467; 28 Cal. 627; 44 Cal. 83. Notary's protest—Political Code, sec. 795. Obligation delivered back—has been paid, sec. 1963, subd. 9. Officer regularly appointed—sec. 1963, subd. 14 and note. Official and judicial duty regularly performed—sec. 1963, subds. 15, 16, and notes. Ordinary care—taken, sec. 1963, subd. 4. Ordinary consequences—intended, sec. 1963, subd. 3. Ordinary course of business—followed, sec. 1963, subd. 20 and note. Ordinary course of nature, etc.—sec. 1963, subd. 28. Ownership—whence presumed, sec. 1963, subd. 12: from possession, sec. 1963, subd. 11 and note. Partnership—whence presumed, sec. 1963, subd. 29 and note: special, Civil Code, sec. 2484: use of fictitious names in, Civil Code, secs. 2466-2471. Person not heard from—in seven years, deemed dead, sec. 1963, subd. 26 and note. Possession imports ownership—sec. 1963, subd. 11 and note. Possessor of order on himself—sec. 1963, subd. 26 and note. Private transactions—deemed regular, sec. 1963, subd. 19. Probate Court order—for disclosure of property, sec. 1460. Promissory note; etc.—imports consideration, sec. 1963, subd. 21 and note. Receipt—later, imports previous payments, sec. 1963, subd. 10: only *prima facie* evidence, 48 Cal. 635. Record—judicial deemed correct, sec. 1963, subd. 17. Short-hand notes—sec. 273. Stock—sale for assessments, Civil Code, sec. 348. Surveys—Political Code, sec. 3973. Surviving calamity—sec. 1968, subd. 40. Thing delivered—to owner, sec. 1963, subd. 8 and note. Unlawful intent—sec. 1963, subd. 2.

CHAPTER VI.

INDISPENSABLE EVIDENCE.

- 1967. Indispensable evidence, what.
- 1968. To prove usage, perjury, and treason, more than one witness required.
- 1969. Will to be in writing.
- 1970. How revoked.
- 1971. Transfer of real property to be in writing.
- 1972. Last section not to extend to certain cases.
- 1973. Agreement not in writing, when invalid.
- 1974. Representation of credit by writing.

§ 1967. The law makes certain evidence necessary to the validity of particular acts, or the proof of particular facts.

§ 1968. Perjury and treason must be proved by testimony of more than one witness. Treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.

Two witnesses—for probate of lost will, sec. 1339.

§ 1969. A last will and testament, except a nuncupative will, is invalid, unless it be in writing and executed with such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given. [In effect July 1st, 1874.]

Lost or destroyed will—probate of, secs. 1338-1341.

§ 1970. A written will cannot be revoked or altered otherwise than as provided in the Civil Code. [In effect July 1st, 1874.]

Revocation or alteration of will—see Civil Code, sec. 1292 *et seq.*

§ 1971. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance, or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

Scope of section—application restricted by, sec. 1972.

Corresponding provision—Civil Code, sec. 1091.

Real property—estate, interest, etc., in, compare sec. 1973, subd. 5: bill of sale insufficient, 52 Cal. 191: mortgage lien can only be created by writing, 53 Cal. 677.

Trust—Civil Code, sec. 852; 6 Cal. 154.

§ 1972. The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

Trusts—Implied, 21 Cal. 92; 22 Cal. 575; 27 Cal. 119; 35 Cal. 481; 36 Cal. 94.

Part performance—enforcing verbal contract after, 1 Cal. 119, 207; 10 Cal. 150; 19 Cal. 447; 24 Cal. 142; 35 Cal. 646; 39 Cal. 109; 44 Cal. 595; 48 Cal. 194: executed parol agreement to convey land, not within statute, 52 Cal. 561.

§ 1973. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof;

2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four of the Civil Code;

3. An agreement made upon consideration of marriage, other than a mutual promise to marry;

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase-money; but when a sale is made by auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kind of property sold, the terms of sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum;

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

Corresponding provision—see Civil Code, sec. 1624.

Note or memorandum—language and sufficiency of, 21 Cal. 609; 37 Cal. 250: by auctioneer, sec. 1973, subd. 4, and note.

SUBDIVISION 1. Agreement not to be performed within a year—cases within Statute of Frauds, 43 Cal. 509; 46 Cal. 266; not within statute, 49 Cal. 274: parol partnership, part performance, 47 Cal. 174.

SUBDIVISION 2. Guaranty—corresponding provision, Civil Code, sec. 2793: exception, Civil Code, sec. 2794: executor by, sec. 1612: within the statute, 2 Cal. 156; 9 Cal. 328; 12 Cal. 286, 542; 29 Cal. 604; 53 Cal. 54: otherwise, 5 Cal. 285; 6 Cal. 102; 7 Cal. 32; 12 Cal. 311; 18 Cal. 622; 22 Cal. 187; 27 Cal. 80; 29 Cal. 150; 33 Cal. 121; 34 Cal. 673; 38 Cal. 133; written consideration for forbearance, 2 Cal. 460; 50 Cal. 255: of promissory note, 2 Cal. 485.

SUBDIVISION 4. Agreement for sale of goods, etc.—auction sale, entry of, see 1 Cal. 415; also, Civil Code, sec. 1798, Political Code, sec. 3292: corresponding provision, Civil Code, sec. 1739, and see Civil Code, sec. 1740: contract in writing, when presumed, 1 Cal. 181: delivery, 3 Cal. 140; 8 Cal. 614; 14 Cal. 384; 19 Cal. 393; 22 Cal. 103, 539; 23 Cal. 65, 540: goods and chattels, growing crops are not, 6 Cal. 664; 17 Cal. 545; 37 Cal. 634: insurance policy, fire, as collateral security, 30 Cal. 87: mining stocks bought on margin, 47 Cal. 142.

SUBDIVISION 5. Agreement as to real property—agent's authority, 21 Cal. 389; 30 Cal. 360; 47 Cal. 213: auction sale, when void, 6 Cal. 75: before statute enacted, 1 Cal. 98: corresponding provision, Civil Code, sec. 1741: court, sale by, not within statute, 9 Cal. 181: executed parol agreement to convey lands, not within statute, 4 Cal. 315; 39 Cal. 639; 52 Cal. 561: growing crops, not within statute, 23 Cal. 69; 37 Cal. 634: lease for more than year, 2 Cal. 603: Mexican law, parol contracts under, 1 Cal. 119; 10 Cal. 17; 24 Cal. 222; 44 Cal. 331; 45 Cal. 587: mining claim, 14 Cal. 22; 20 Cal. 198; 23 Cal. 178; 30 Cal. 481; 51 Cal. 238: oral agreement not to oppose patent, void, 52 Cal. 624: part performance, sec. 1972 and note: promise, parol, to pay for improvements, void, 2 Cal. 489: purchase for another, 22 Cal. 575; 35 Cal. 488: right of way, 38 Cal. 111: services in selling land, 37 Cal. 629; 38 Cal. 99; 48 Cal. 194: specific performance of verbal contract, 24 Cal. 171: trust, violation of, 21 Cal. 97; 35 Cal. 431: unwritten contract for sale of land, void, 4 Cal. 50: verbal agreement to reconvey land, 48 Cal. 465; 50 Cal. 23: void in part, if entire contract invalid, 33 Cal. 99: writing need not be alleged, 51 Cal. 210.

§ 1974. No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the handwriting of, the party to be charged.

CHAPTER VII.

CONCLUSIVE OR UNANSWERABLE EVIDENCE.

§ 1978. Conclusive or unanswerable evidence.

§ 1978. No evidence is by law made conclusive or unanswerable, unless so declared by this Code.

Estoppel—secs. 1908, 1962.

TITLE III.

Of the Production of Evidence.

- CHAP. I. By whom to be produced. §§ 1981-1982.**
II. Means of production. §§ 1985-1997.
III. Manner of production. §§ 2002-2054.

CHAPTER I. BY WHOM TO BE PRODUCED.

§ 1981. Evidence to be produced, by whom.

§ 1982. Writing altered, who to explain.

§ 1981. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

Burden of proof—see under **AFFIRMATIVE ALLEGATIONS**, sec. 1869n: affirmative matter in answer, where, 8 Cal. 31; 15 Cal. 100: ejectment in, 51 Cal. 55; insanity of, 47 Cal. 134; money paid under duress, 26 Cal. 606.

§ 1982. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise.

Alteration—effect of, 50 Cal. 613: impeaching certificate for, 32 Cal. 171: in indictment, 50 Cal. 447: need of accounting for, 26 Cal. 85: sufficiently explained, 34 Cal. 564.

Printed form—erasure in, 32 Cal. 88: construction of, sec. 1862.

CHAPTER II. MEANS OF PRODUCTION.

- 1985. Subpoena for witness defined.
- 1986. Subpoena, how issued.
- 1987. Subpoena, how served.
- 1988. How, if witness be concealed.
- 1989. When a witness is compelled to attend.
- 1990. Person present compelled to testify.
- 1991. Disobedience, how punished.
- 1992. Forfeiture therefor.
- 1993. Warrant may issue to bring witness, when.
- 1994. Contents of warrant.
- 1995. If witness be a prisoner, how brought.
- 1996. On whose motion.
- 1997. How examined.

§ 1985. The process by which the attendance of a witness is required is a subpoena. It is a writ or order di-

rected to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence.

§ 1986. The subpoena is issued as follows:

1. To require attendance before a court, or at the trial of an issue therein, it is issued under the seal of the court before which the attendance is required, or in which the issue is pending;

2. To require attendance out of the court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this State, it is issued by the judge, justice, or any other officer before whom the attendance is required;

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other State in the United States, or of any other district or county within this State, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdiction; with like power to enforce attendance, and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpoena directed the attendance of the witness before their courts in a matter pending therein.

§ 1987. The service of a subpoena is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person.

§ 1988. If a witness is concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any court or judge, or any officer issuing a subpoena, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

§ 1989. A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

§ 1990. A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer.

§ 1991. Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out.

Disobedience to subpoena—46 Cal. 82.

Refusal to answer—sec. 2065; 35 Cal. 89.

Contempt—secs. 1209, 1219.

§ 1992. A witness disobeying a subpoena also forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

§ 1993. In case of failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

§ 1994. Every warrant of commitment, issued by a court or officer pursuant to this chapter, must specify therein, particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness, pursuant to this chapter, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the Superior Court. [In effect April 16th, 1880.]

§ 1995. If the witness be a prisoner, confined in a jail or prison within this State, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer, for the

purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a Justice's Court;

2. By a justice of the Supreme Court, or a judge of the Superior Court of the county where the action or proceeding is pending, if pending before a Justice's Court, or before a judge or other person out of court. [In effect April 16th, 1880.]

§ 1996. Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

§ 1997. If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition.

CHAPTER III.

MANNER OF PRODUCTION.

- ART. I. MODE OF TAKING THE TESTIMONY OF WITNESSES
- II. AFFIDAVITS.
- III. DEPOSITIONS.
- IV. MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.
- V. MANNER OF TAKING DEPOSITIONS IN THE STATE.
- VI. GENERAL RULES OF EXAMINATION.

ARTICLE I.

MODE OF TAKING THE TESTIMONY OF WITNESSES.

- § 2002. Testimony, in what mode taken.
- § 2003. Affidavit defined.
- § 2004. A deposition defined.
- § 2005. Oral examination defined.
- § 2006. Deposition, how taken.

§ 2002. The testimony of witnesses is taken in three modes:

1. By affidavit;
2. By deposition;
3. By oral examination.

§ 2003. An affidavit is a written declaration under oath, made without notice to the adverse party.

Affidavits—sec. 2009 et seq.

§ 2004. A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

Depositions—secs. 2019-2021: form of, sec. 2006.

§ 2005. An oral examination is an examination in presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

General rules of examination—secs. 2042-2054.

§ 2006. Depositions must be taken in the form of question and answer, and the words of the witness must be written down, unless the parties agree to a different mode.

Form of taking depositions—formerly, in narrative form, 35 Cal. 20.

ARTICLE II.

AFFIDAVITS.

§ 2009. Affidavits and depositions, how taken.

§ 2010. Evidence of publication, what.

§ 2011. Where filed.

§ 2012. Affidavits to be used in this State, before whom may be taken in this State.

§ 2013. If made in another State of the United States, before whom taken.

§ 2014. If made in a foreign country, before whom taken.

§ 2015. Certificate of the clerk, if taken before a judge of a court out of this State.

§ 2009. An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other case expressly permitted by some other provision of this Code.

Use of affidavits—31 Cal. 203.

Signature—not essential, 15 Cal. 53.

In foreign language—excluded, 23 Cal. 418.

Extent of affidavit—27 Cal. 298.

§ 2010. Evidence of the publication of a document or notice required by law, or by an order of a court or judge, to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made.

Affidavit of publication—see sec. 413n: "proprietor" synonymous with "printer," 37 Cal. 458.

§ 2011. If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or a clerk thereof. If not so made, it may be filed with the clerk of the county where the newspaper is printed. In either case, the original affidavit, or a copy thereof, certified by the judge of the court or clerk having it in custody, is *prima facie* evidence of the facts stated therein. [In effect July 1st, 1874.]

§ 2012. An affidavit to be used before any court, judge, or officer of this State, may be taken before any judge or clerk of any court, or any justice of the peace or notary public in this State.

Persons authorized to take affidavits—sec. 179, subd. 3: official character of justice of the peace, within the State, need not appear, 15 Cal. 53.

§ 2013. An affidavit taken in another State of the United States, to be used in this State, may be taken before a commissioner appointed by the governor of this State to take affidavits and depositions in such other State, or before any notary public in another State, or before any judge or clerk of a court of record having a seal. [In effect July 1st, 1874.]

§ 2014. An affidavit taken in a foreign country to be used in this State, may be taken before an ambassador, minister, consul, vice-consul, or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country. [In effect July 1st, 1874.]

§ 2015. When an affidavit is taken before a judge of a court in another State, or in a foreign country, the genuineness of the signature of the judge, the existence of the court and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.

ARTICLE III.

DEPOSITIONS.

§ 2019. Deposition, when used.

§ 2020. Testimony of a witness out of the State, when taken.

§ 2021. In the State, when taken.

§ 2019. In all cases other than those mentioned in section two thousand and nine, where a written declaration under oath is used, it must be a deposition as prescribed by this Code.

§ 2020. The testimony of a witness out of the State may be taken by deposition, in an action, at any time after the service of the summons or the appearance of the defendant; and, in a special proceeding, at any time after a question of fact has arisen therein.

Manner of taking depositions out of the State—sec. 2024 *et seq.*

§ 2021. The testimony of a witness in this State may be taken by deposition in an action at any time after the service of the summons on the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases:

1. When the witness is a party to the action or proceeding, or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

2. When the witness resides out of the county in which his testimony is to be used.

3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required

6. When the witness is the only one who can establish facts or a fact material to the issue; *provided*, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause. [In effect March 9th, 1878.]

Deposition—mode of taking, sec. 2006: who may take, 2 Cal. 25; sec. 179, subd. 3; in this state, manner of taking, sec. 2031 *et seq.*: name part of testimony, 49 Cal. 383: service of, 47 Cal. 644: strict construction before Code, 2 Cal. 28, 383: amending answer after, 47 Cal. 174.

SUBDIVISION 1. Party, etc.—29 Cal. 619.

SUBDIVISION 2. Out of county—29 Cal. 619.

ARTICLE IV.

MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.

§ 2024. Testimony of witness out of State taken upon commission issued under seal, upon notice. To whom to issue.

§ 2025. Proper interrogatories may be prepared, or may be waived by the parties.

§ 2026. Authorities and duties of commissioner.

§ 2027. Trial, when postponed for reason of non-return of commission.

§ 2028. Depositions, by whom used.

§ 2024. The deposition of a witness out of this State may be taken upon commission issued from the court, under the seal of the court, upon an order of the court, or a judge thereof, on the application of either party, upon five days' previous notice to the other. If issued to any place within the United States, it may be directed to a person agreed upon by the parties, or, if they do not agree, to any judge or justice of the peace, or commissioner, selected by the court or judge issuing it. If issued to any country out of the United States, it may be directed to a minister, ambassador, consul, vice-consul, or consular agent of the United States in such country, or to any person agreed upon by the parties. [In effect April 16th, 1880.]

Commissioner—estoppel to dispute regularity of appointment, 27 Cal. 377.

§ 2025. Such proper interrogatories, direct and cross, as the respective parties may prepare to be settled, if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or, when the parties agree to that mode, the examination may be without written interrogatories.

Interrogatories—question and answer in depositions, sec. 2006.

§ 2026. The commission must authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelope, directed to the clerk or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

Certificate—sec. 2032a; 27 Cal. 372.

§ 2027. A trial or other proceeding must not be postponed by reason of a commission not returned, except upon evidence, satisfactory to the court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

Continuance—none, where no diligence in obtaining commission, 2 Cal. 598.

§ 2028. The deposition mentioned in this article may be used by either party on the trial or other proceeding, against any other party giving or receiving the notice, subject to all just exceptions.

ARTICLE V.

MANNER OF TAKING DEPOSITIONS IN THIS STATE.

§ 2031. Depositions may be taken before a judge, etc., upon notice to the adverse party.

§ 2032. Manner of taking depositions. May be used by either party on the trial.

2033. When deposition excluded.

2034. A deposition once taken may be read at any time.

2035. Deposition in this State to be used in other States.

2036. How to procure witness upon commission.

2037. How, if no commission.

2038. Deposition, how taken.

§ 2031. Either party may have the deposition taken of a witness in this State, in either of the cases mentioned in section two thousand and twenty-one, before a judge or officer authorized to administer oaths, on serving upon

the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is within that section. Such notice must be at least five days, adding also one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order must be served with the notice.

Notice—absence of, 5 Cal. 444; contents of, 6 Cal. 559; proof of service of, 43 Cal. 485; service of, before Code, 47 Cal. 644; sufficiency of, 17 Cal. 37; time shortened, 17 Cal. 37.

§ 2032. Either party may attend the examination and put such questions, direct and cross, as may be proper. The deposition, when completed, must be carefully read to the witness and corrected by him in any particular, if desired; it must then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelope or wrapper, sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail, or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken under subdivisions two, three, and four, of section two thousand and twenty-one, proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition thus taken may be also read in case of the death of the witness.

Ex parte deposition—after notice, 6 Cal. 17.

Certificate—6 Cal. 559; 18 Cal. 330; 35 Cal. 30.

Objections to deposition—2 Cal. 383; 3 Cal. 94; 9 Cal. 68; 14 Cal. 542; 18 Cal. 330; 19 Cal. 683; 22 Cal. 42; 36 Cal. 191; 43 Cal. 485; when not admissible against executor, 51 Cal. 101.

§ 2033. Notwithstanding the taking of a deposition, it may be excluded from the case upon proof that sufficient notice was not given to the party against whom it is offered to enable him to attend the taking thereof, or that the taking was not in all respects fair.

§ 2034. When a deposition has been once taken, it may be read by either party in any stage of the same

action or proceeding, or in any other action between the same parties upon the same subject, and is then deemed the evidence of the party reading it.

Reading deposition—in same action, 14 Cal. 542; sec. 2028: in another action, by stipulation, 22 Cal. 42.

§ 2035. Any party to an action or special proceeding in a court, or before a judge, of a sister State, may obtain the testimony of a witness residing in this State, to be used in such action or proceeding, in the cases mentioned in the next two sections.

§ 2036. If a commission to take such testimony has been issued from the court, or a judge thereof, before which such action or proceeding is pending, on producing the commission to a judge of the Superior Court, with an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpoena to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place. [In effect April 16th, 1880.]

Subpoena—sec. 1935 *et seq.*

§ 2037. If a commission has not been issued, and it appear to a judge of the Superior Court, or to a justice of the peace, by affidavit satisfactory to him:

1. That the testimony of the witness is material to either party;

2. That a commission to take the testimony of such witness has not been issued;

3. That, according to the law of the State where the action or special proceeding is pending, the deposition of a witness taken under such circumstances, and before such judge or justice, will be received in the action or proceeding; he must issue his subpoena requiring the witness to appear and testify before him at a specified time and place. [In effect April 16th, 1880.]

§ 2038. Upon the appearance of the witness, the judge or justice must cause his testimony to be taken in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that State requires.

ARTICLE VI.

GENERAL RULES OF EXAMINATION.

2042. Order of proof, how regulated.

2043. Witnesses not under examination may be excluded.

2044. Court may control mode of interrogation.

2045. Direct and cross-examination defined.

- 2046. Leading question defined.
- 2047. When witness may refresh memory from notes.
- 2048. Cross-examination, as to what.
- 2049. Party producing witness, how far may impeach his credit.
- 2050. Witness, how examined. When re-examined.
- 2051. How impeached.
- 2052. Same.
- 2053. Evidence of good character, when allowed.
- 2054. Writing shown to witness may be inspected by adverse party.

§ 2042. The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins.

Order of proof—controlled by court, sec. 607 and note: reopening case, sec. 607, subd. 3, note, and 5 Cal. 137: in criminal case, 47 Cal. 388: where assignment of contract, 27 Cal. 248.

§ 2043. If either party requires it, the judge may exclude from the court-room any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses.

Exclusion of witnesses—proper, 53 Cal. 491: discretion of court, 29 Cal. 622: effect of disobeying order for, 20 Cal. 436.

§ 2044. The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth as may be; but subject to this rule—the parties may put such pertinent and legal questions as they see fit. The court, however, may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt.

Control of court—over examination, 47 Cal. 194: answer of witness, secs. 2063, 2066: stopping further testimony, 39 Cal. 38.

§ 2045. The examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness, upon the same matter, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct.

§ 2046. A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it.

§ 2047. A witness is allowed to refresh his memory respecting a fact, by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing. But in such case, the writing must be produced and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.

Refreshing memory—4 Cal. 260; 49 Cal. 166.

Inspection of writing—shown to witness, sec. 2054.

§ 2048. The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination.

Cross-examination, scope and extent of—common territory, on, 33 Cal. 223; credibility of witness, attacking, 27 Cal. 63; 39 Cal. 625; 37 Cal. 425, and see impeachment: directing attention of witness, 46 Cal. 121; discretion of court, 36 Cal. 223; 45 Cal. 146; 47 Cal. 194; forcible entry and detainer, 36 Cal. 580; impeachment by collateral question, 53 Cal. 65, 119; new matter, etc., 14 Cal. 18; 25 Cal. 212; 30 Cal. 159; 32 Cal. 106; objection, raising in time, 45 Cal. 146; party as witness, 41 Cal. 425; prohibiting continuance, 47 Cal. 194; range of, 33 Cal. 641; 51 Cal. 75, 87; recall for, 49 Cal. 632; 50 Cal. 137; responsive to direct examination, 5 Cal. 450; 7 Cal. 561; 14 Cal. 18; 33 Cal. 99; stopping further testimony, sec. 2044; stopping one's own witness, 36 Cal. 223.

§ 2049. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section two thousand and fifty-two.

Scope of provision—30 Cal. 394.

Discrediting one's own witness—49 Cal. 384: when not permitted. 30 Cal. 360; no need of contradicting at time, 22 Cal. 231; party made one's witness, estoppel as to, 12 Cal. 308.

§ 2050. A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court.

Leave is granted or withheld, in the exercise of a sound discretion.

Recalling witness—in criminal case, 49 Cal. 623: discretion of court, sec. 607, subd. 3, note; 50 Cal. 137; 51 Cal. 191.

§ 2051. A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony.

Compare—sec. 1847.

Impeaching adverse witness—*General reputation bad*, personal knowledge not sufficient, 53 Cal. 68: credibility, 41 Cal. 66; 48 Cal. 185; 49 Cal. 32, 632: not believing under oath, 12 Cal. 306; 35 Cal. 553: hostility, 48 Cal. 185: chastity, lack of, not ground, 27 Cal. 630; 48 Cal. 553. *Previous conviction of felony*, 39 Cal. 449, 614, 697; 50 Cal. 233; 51 Cal. 597. *Range of cross-examination*, collateral matters, 51 Cal. 597; 53 Cal. 65, 119: good character, showing after impeachment, sec. 2053a: laying foundation, 53 Cal. 425.

§ 2052. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

Inconsistent statements of witness—impeachment by showing, 2 Cal. 326; 16 Cal. 173, 222; 17 Cal. 605; 21 Cal. 368; 25 Cal. 587; 29 Cal. 421, 492; 33 Cal. 522; 43 Cal. 162; 44 Cal. 452; 47 Cal. 138; 48 Cal. 85, 185; 49 Cal. 384; 50 Cal. 628; 51 Cal. 551.

§ 2053. Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character.

Evidence of good character—effect of, 49 Cal. 485: in criminal case, 49 Cal. 629: after impeachment, 48 Cal. 61; 50 Cal. 233: judge's indorsement of witness improper, 27 Cal. 300: rebutting, irrelevant, *Donnelly v. Curran*, March 18th, 1880, 5 Pac. C. L. J. 215.

§ 2054. Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the witness must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness.

Writing shown to witness—open to inspection, where merely identified, 82 Cal. 457: where put in evidence, 40 Cal. 638; where done to refresh memory, sec. 2047.

PENAL APPENDIX.—59.

TITLE IV.
OF THE EFFECT OF EVIDENCE.

§ 2061. Jury judges of effect of evidence, but to be instructed on certain points.

§ 2061. The jury, subject to the control of the court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions—

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence.

2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.

3. That a witness false in one part of his testimony is to be distrusted in others.

4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution.

5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt.

6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and, therefore,

7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

Province of jury—questions of fact, sec. 2101: effect of evidence, 30 Cal. 151; 40 Cal. 272; 48 Cal. 89; 51 Cal. 603; 53 Cal. 415, 625; *Helbing v. Svea Ins. Co.*, Feb. 12th, 1880; 4 Pac. C. L. J. 553; *Myers v. Spooner*, July 8th, 1880, 5 Pac. C. L. J. 612: credibility of witnesses, see last subhead, and 47 Cal. 531.

Province of court—compare sec. 608 and notes, sec. 2102.

SUBDIVISION 2. Majority of witnesses—not decisive, 36 Cal. 57:

most positive testimony may be rejected, 15 Cal. 638: jury are judges of credibility, see under PROVINCE OF JURY, note *supra*.

SUBDIVISION 3. Witness, false in part—to be distrusted in all; willful falsity requisite, 53 Cal. 491: disregarding testimony improper, 30 Cal. 151; 53 Cal. 354.

SUBDIVISION 4. Accomplice—distrusting testimony of, etc., see 39 Cal. 614; 53 Cal. 601, 604, corroborating 30 Cal. 316; 39 Cal. 403; 50 Cal. 450.

Admissions—see sec. 1870, subd. 2 and note.

SUBDIVISION 5. Civil cases—affirmative of issue to be proved, see sec. 1931: preponderance of evidence, 50 Cal. 633.

Criminal cases—beyond reasonable doubt, 51 Cal. 372; 53 Cal. 446; 53 Cal. 67: same on justification of truth in slander, 50 Cal. 631.

SUBDIVISION 7. Weaker evidence offered—5 Cal. 249; 9 Cal. 430.

TITLE V.
**OF THE RIGHTS AND DUTIES OF WIT-
NESSES.**

- § 2064. Witnesses bound to attend when subpoenaed.
- § 2065. Witnesses bound to answer questions.
- § 2066. Right of witnesses to protection.
- § 2067. Witnesses protected from arrest when attending, or going or returning.
- § 2068. Arrest to be made void, and party making arrest liable, etc.
- § 2069. To make affidavit if arrested.
- § 2070. Court to discharge witness from arrest.

§ 2064. A witness, served with a subpoena, must attend at the time appointed, with any papers under his control required by the subpoena, and answer all pertinent and legal questions; and, unless sooner discharged, must remain until the testimony is closed.

Subpoena—secs. 1985, 1991.

Answering questions—sec. 2065.

Witnesses—competency, etc., secs. 1878-1884: examination, impeachment, refreshing memory, etc., secs. 2042-2054.

§ 2065. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.

Witness implicating himself—when privileged from answering, Cal. 184; degrading answer, 35 Cal. 69; 39 Cal. 449.

§ 2066. It is the right of a witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

Compare—sec. 2044.

Detention of witness—unreasonable, constitutional prohibition of, see Const. Cal. art. 1, sec. 6.

§ 2067. Every person who has been, in good faith, served with a subpoena to attend as a witness before a

court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.

Exemption from arrest—but not from obeying ordinary process, 6 Cal. 32.

§ 2068. The arrest of a witness, contrary to the preceding section, is void, and when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with a subpoena, for the damages sustained by him in consequence of the arrest.

Contempt of court—see secs. 1209-1222.

§ 2069. An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating—

1. That he has been served with a subpoena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued; and,

2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest;

3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena.

The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.

§ 2070. The court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of section two thousand and sixty-seven. If the court have adjourned before the arrest, or before application for the discharge, a judge of the court may grant the discharge. [In effect April 16th, 1880.]

TITLE VI.

**Of Evidence in Particular Cases, and
Miscellaneous and General Provisions.**

- CHAP. I. Evidence in particular cases, §§ 2074-2079.
II. Proceedings to perpetuate testimony, §§ 2083-2089.
III. Administration of oaths and affirmations, §§ 2093-2095.
IV. General provisions, §§ 2101-2104.

CHAPTER I.

EVIDENCE IN PARTICULAR CASES.

- § 2074. An offer equivalent to payment.
- § 2075. Whoever pays entitled to receipt.
- § 2076. Objections to tender must be specified.
- § 2077. Rules for construing description of lands.
- § 2078. Compromise offer of no avail.
- § 2079. In action for divorce, admission not sufficient.

§ 2074. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

Offer to compromise—secs. 997, 2078.

Tender—alleging, 15 Cal. 376; 34 Cal. 616: attorney in fact, by, 1 Cal. 337; 49 Cal. 586: effect of, 14 Cal. 519; 34 Cal. 686; 41 Cal. 133: sufficiency of, 5 Cal. 339; 15 Cal. 208; 32 Cal. 168; *Herman v. Haffenegger*, Feb. 12th, 1880, 4 Pac. C. L. J. 559: sureties, by, 26 Cal. 535.

§ 2075. Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery.

§ 2076. The person to whom a tender is made, must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward.

§ 2077. The following are the rules for constructing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars;

2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measure-

ment, either of lines, angles, or surfaces, the boundaries or monuments are paramount;

3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both;

4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title;

5. When tide-water is the boundary, the rights of the grantor to ordinary high-water-mark are included in the conveyance. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water-mark are included in the conveyance;

6. When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars. [In effect July 1st, 1874.]

Description in conveyance—construction of, sec. 1860; 10 Cal. 189; 24 Cal. 435; 25 Cal. 296, 440; 29 Cal. 386; 30 Cal. 468; 34 Cal. 334; 36 Cal. 122, 606; 37 Cal. 432; 39 Cal. 122, 239; 42 Cal. 326; 43 Cal. 171, 219; 44 Cal. 132; 47 Cal. 474; 49 Cal. 59; 50 Cal. 171, 429; 51 Cal. 125, 198; 52 Cal. 154, 500, 579, 655. *Sherman v. McCarthy*, March 3rd, 1880, 5 Pac. C. L. J. 58; *Black v. Sprague*, March 6th, 1880, 5 Pac. C. L. J. 92; construction of instruments, generally, sec. 1859 and note.

SUBDIVISION 1. Definite particulars prevail—10 Cal. 621; 16 Cal. 514; 27 Cal. 57; 34 Cal. 624; 36 Cal. 125; 41 Cal. 263; 44 Cal. 132, 257; 45 Cal. 132, 610; 47 Cal. 581; 48 Cal. 28; 49 Cal. 525; 53 Cal. 589.

SUBDIVISION 2. Boundaries or monuments paramount—10 Cal. 590; 11 Cal. 197; 12 Cal. 163; 17 Cal. 231; 22 Cal. 496; 26 Cal. 615; 28 Cal. 175; 29 Cal. 178, 386; 32 Cal. 11, 219; 34 Cal. 334; 37 Cal. 436; 38 Cal. 481; 39 Cal. 612; 43 Cal. 219; 47 Cal. 67; 50 Cal. 376, 429; 52 Cal. 442, 496; 53 Cal. 316; and see *Black v. Sprague*, March 6th, 1880, 5 Pac. C. L. J. 92.

SUBDIVISION 3. Lines and angles prevail—22 Cal. 502.

SUBDIVISION 4. Road or stream as boundary—22 Cal. 484; 25 Cal. 122; 42 Cal. 326; 50 Cal. 31; 51 Cal. 195, 425.

SUBDIVISION 6. Reference to map—10 Cal. 589; 24 Cal. 435; 38 Cal. 448; 47 Cal. 52; 50 Cal. 321, 333, 429, 450; *Black v. Sprague*, March 6th, 1880, 5 Pac. C. L. J. 92.

§ 2078. An offer of compromise is not an admission that anything is due.

Offer to compromise—after suit brought, sec. 997.

§ 2079. In an action for divorce on the ground of adultery, a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce.

Divorce—generally, sec. 76, subd. 4, note.

Confessions—must be corroborated, 41 Cal. 103; as evidence generally, sec. 1870, subd. 2a.

CHAPTER II.

PROCEEDINGS TO PERPETUATE TESTIMONY.

- § 2083. Evidence may be perpetuated.
- § 2084. Manner of application for order.
- § 2085. Notice of time and place to be given.
- § 2086. Manner of taking the deposition.
- § 2087. Deposition to be filed.
- § 2088. When the evidence may be produced.
- § 2089. Effect of the deposition.

§ 2083. The testimony of a witness may be taken and perpetuated as provided in this chapter.

§ 2084. The applicant must produce to a judge of the Superior Court a petition, verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a court in this State, and, in such case, the names of the persons whom he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented must make an order allowing the examination, and designating the officer before whom the same must be taken, and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this State, must be personally served, and if unknown, such notice must be served on the clerk of the county where the property to be affected by such evidence is situated, or the judge making the order resides, as may be directed by him, and by publication thereof in some newspaper, to be designated by the judge, for the same period required for the publication of summons. The judge must also designate in his order the clerk of the county to whom the deposition must be returned when taken. [In effect April 16th, 1880.]

§ 2085. The person appointed by the judge to take the depositions is authorized, if a resident of this State, on receiving a copy of the order of the judge, and of the notice prescribed in the last section, with proof of its personal service or publication—or, if a resident without the State, on receiving the commission mentioned in the next section, with proof of like service of publication of the notice—to take the deposition of the witness named in the order of the judge, or in the commission, or, if more than one witness is thus named, of such of them as appear before him, at the time designated, and the taking of the same may be continued from time to time. [In effect July 1st, 1874.]

§ 2086. The examination must be by question and answer, and if the testimony is to be taken in another State, it must be taken upon a commission to be issued by the judge allowing the examination, under the seal of the court of which he is judge, and upon interrogatories, to be settled in the same manner as in cases of depositions taken under commission in pending actions, unless the parties expectant, if known, otherwise agree. If such parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper for such time as the judge may designate. The deposition, when completed, must be carefully read to and subscribed by the witness, then certified by the officer or person taking the same, and shall then be sealed up and delivered or transmitted to the clerk of the county designated in the order of the judge allowing the examination, who shall file the same when received. The judge allowing the examination shall file with the clerk the order for the examination, the petition on which the same was granted, with proof of service of the order and notice. [In effect July 1st, 1874.]

§ 2087. The petition and order, and papers filed by the judge as provided in section two thousand and eighty-six, or a certified copy thereof, are *prima facie* evidence of the facts stated therein to show compliance with the provisions of this chapter. [In effect July 1st, 1874.]

§ 2088. If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death or insanity of the witnesses, or that they cannot be found, or are unable, by reason of age or other infirmity, to give their testimony,

the depositions or copies thereof may be used by either party, subject to all legal objections; but if the parties attended at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination. [In effect July 1st, 1874.]

§ 2089. The deposition so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial.

CHAPTER III.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

- § 2093. Judicial and certain officers authorized to administer oaths.
- § 2094. Form of ordinary oath to a witness.
- § 2095. Form may be varied to suit witness' belief.
- § 2096. Same.
- § 2097. Any person who prefers it may declare or affirm.

§ 2093. Every court, every judge or clerk of any court, every justice and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.

Administration of oaths—by whom, sec. 128, subd. 7; sec. 177, subd. 4; Political Code, secs. 1028, 4118; by clerk for court, 48 Cal. 197; preliminary questions, 49 Cal. 383.

§ 2094. An oath, or affirmation, in an action or proceeding, may be administered as follows, the person who swears, or affirms, expressing his assent when addressed in the following form: "You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue, (or matter) pending between — and —, shall be the truth, the whole truth, and nothing but the truth, so help you God." [In effect July 1st, 1874.]

§ 2095. Whenever the court before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing, connected with, or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may in its discretion, adopt that mode.

§ 2096. When a person is sworn who believes in any other than the christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

§ 2097. Any person who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed in the following form: "You do solemnly affirm (or declare) that," etc., as in section two thousand and ninety-four.

CHAPTER IV.

GENERAL PROVISIONS.

- § 2101. Questions of fact to be decided by the jury, and the evidence addressed to them.
§ 2102. Questions of law addressed to the court.
§ 2103. Questions of fact by court or referee.
§ 2104. Moneys paid into court.

§ 2101. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code. [In effect July 1st, 1874.]

Compare—sec. 2061.

Questions of fact, for jury—4 Cal. 260; 9 Cal. 565; 18 Cal. 376; 25 Cal. 197; 30 Cal. 215; 32 Cal. 213; 34 Cal. 663; and see 52 Cal. 315; *People v. Wong Ah Ngow*, Feb. 10th, 1880, 4 Pac. C. L. J. 552; *People v. Mitchell*, May 29th, 1880, 5 Pac. C. L. J. 473; effect of evidence, for jury, sec. 2061 and note: fraudulent intent, Civil Code, sec. 3442; 50 Cal. 137, 140; negligence, as to, 50 Cal. 578, 581; 52 Cal. 45; nuisance, 29 Cal. 156; 30 Cal. 379; 45 Cal. 55; presumptions of fact, 51 Cal. 588.

§ 2102. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this Code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.

Province of court—questions of law, 6 Cal. 119; 15 Cal. 27, 367; 24 Cal. 268; 30 Cal. 548; 36 Cal. 462; 44 Cal. 145; 45 Cal. 255; 49 Cal. 253; 52 Cal. 244; admissibility of evidence, etc., 4 Cal. 105; 23 Cal. 339; 47 Cal. 194; 49 Cal. 56; construction of writings, 39 Cal. 523; 50 Cal. 32.

Knowledge of the court—scope of judicial notice, sec. 1875 and notes.

§ 2103. The provisions contained in this part of the Code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a court, referee, or other officer.

§ 2104. Whenever moneys are paid into or deposited in court, the same shall be delivered to the clerk in person, or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same. He must, unless otherwise directed by law, deposit it

PENAL APPENDIX.—60.

with the county treasurer, to be held by him subject to the order of the court. The treasurer shall keep each fund distinct, and open an account with each. Such appointment shall be filed with the county treasurer, who shall exhibit it, and give to each person applying for the same a certified copy of the same. It shall be in force until a revocation in writing is filed with the county treasurer, who shall thereupon write "revoked," in ink across the face of the appointment. [In effect July 1st, 1874.]

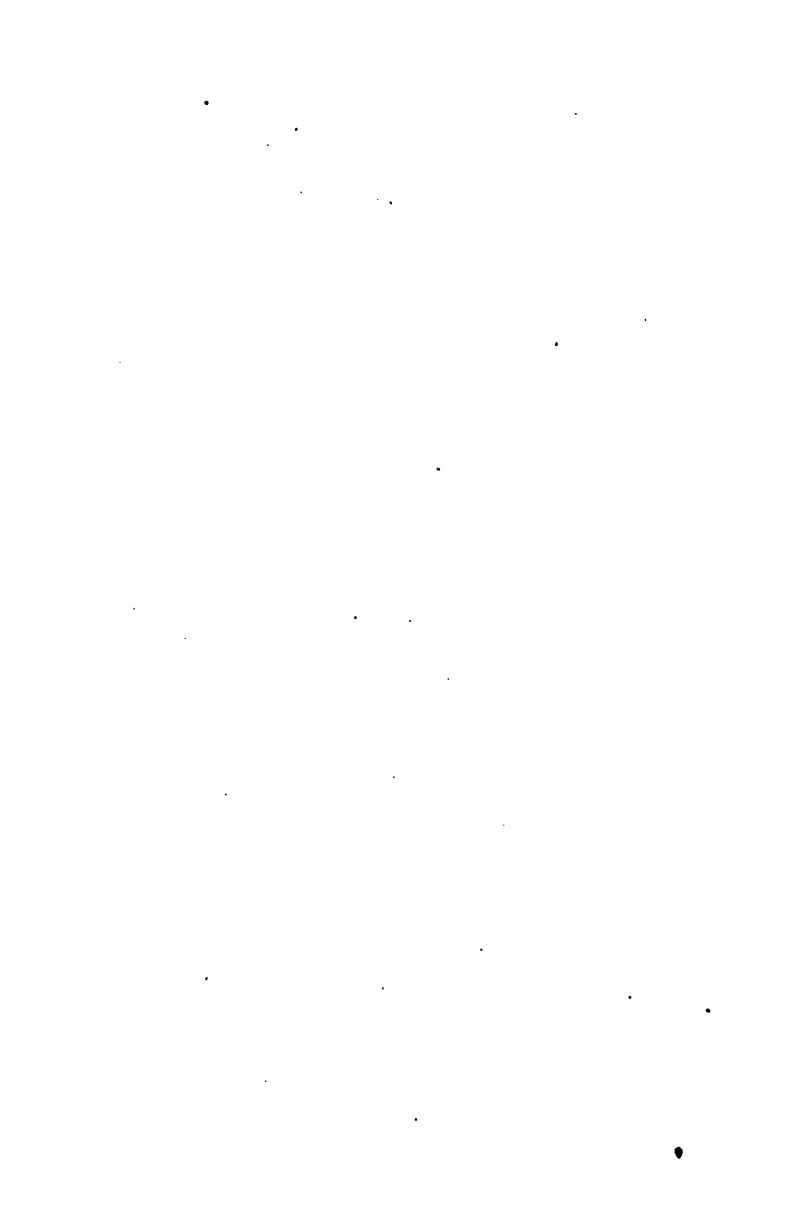
Deposit in court—secs. 572-574; corresponding provision, sec. 573.

Deposit with county treasurer—liable to taxation, 30 Cal. 242.

Final repealing clause—compare, secs. 9, 18.

STATUTES
RELATING TO CRIMES.

[711]



STATUTES

OF A

General nature relating to Crimes, enacted since the Code.

(THE ARRANGEMENT IS CHRONOLOGICAL.)

An Act to prevent the destruction of forests by fire on public lands.

SECTION 1. Any person or persons who shall wilfully and deliberately set fire to any wooded country or forest belonging to this state or the United States, within this state, or to any place from which fire shall be communicated to any such wooded country or forest, or who shall accidentally set fire to any such wooded country or forest, or to any place from which fire shall be communicated to any such wooded country or forest, and shall not extinguish the same, or use every effort to that end, or who shall build any fire, for lawful purpose or otherwise, in or near any such wooded country or forest, and through carelessness or neglect shall permit said fire to extend to and burn through such wooded country or forest, shall be deemed guilty of a misdemeanor, and on conviction before a court of competent jurisdiction, shall be punishable by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or by both such fine and imprisonment; *provided*, that nothing herein contained shall apply to any person who in good faith shall set a back fire to prevent the extension of a fire already burning. All fines collected under this act shall be paid into the county treasury for the benefit of the common school fund of the county in which they are collected. [Approved February 13, 1872. Stats. 1871-2, p. 96.]

An Act to prevent the capture and destruction of mocking birds in this State.

SECTION 1. Any person or persons who shall wilfully and knowingly shoot, wound, trap, snare, or in any other manner catch or capture any mocking bird in the state of California, or shall knowingly take, injure, or destroy the nest of any

mocking bird, or shall take, injure or destroy any mocking bird's eggs, in the nest or otherwise, in said state, shall be deemed guilty of a misdemeanor, and upon conviction thereof before any justice of the peace of the township in which the offense shall have been committed, shall be fined in a sum not less than five dollars nor exceeding ten dollars, and cost of the action for each offense, or may be imprisoned not less than five days nor more than ten days, or by both such fine and imprisonment, as the judgment of the court may direct.

SEC. 2. All fines collected under the provisions of this act shall be paid into the county treasury for the benefit of the common school fund. [In effect February 14, 1872. *Stats.* 1871-2, p. 102.]

An Act to more fully define the crime of larceny.

SECTION 1. Every person who shall convert any manner of real estate, of the value of fifty dollars and upwards, into personal property, by severing the same from the realty of another, with felonious intent to and shall so steal, take, and carry away the same, shall be deemed guilty of grand larceny, and, upon conviction thereof, shall be punishable by imprisonment in the state prison for any term not less than one year nor more than fourteen years.

SEC. 2. Every person who shall convert any manner of real estate, of the value of under fifty dollars, into personal property, by severing the same from the realty of another, with felonious intent to and shall so steal, take, and carry away the same, shall be deemed guilty of petit larceny, and, upon conviction thereof, shall be punishable by imprisonment in the county jail for a period not more than one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. [Approved Mar. 6, 1872. *Stats.* 1871-2, p. 282.]

An Act to punish adultery.

SECTION 1. Every person who lives in a state of open and notorious cohabitation and adultery is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars, or imprisonment in the county jail not exceeding one year, or by both.

SEC. 2. If two persons, each being married to another, live together in a state of open and notorious cohabitation and adultery, each is guilty of a felony, and is punishable by imprisonment in the state prison not exceeding five years.

SEC. 3. A recorded certificate of marriage, or a certified copy thereof, there being no decree of divorce, proves the marriage of a person for the purposes of this act. [Approved March 15, 1872. *Stats.* 1871-2, p. 380.]

An Act to prevent persons passing through inclosures and leaving them open, and tearing down fences to make passage through inclosures.

SECTION 1. Any person passing through an inclosure of another and leaving the same open, is guilty of a misdemeanor, and punishable by a fine not less than twenty dollars nor more than fifty dollars.

SEC. 2. Any person wilfully or maliciously tearing down fences to make a passage through an inclosure, is guilty of a misdemeanor, and punishable by a fine not less than fifty dollars nor more than five hundred dollars.

SEC. 3. All fines collected under the provisions of this act shall be paid into the county school fund of the county where the offense is committed. [In effect March 16, 1872. Stats. 1871-2, p. 384.]

An Act supplementary to an Act entitled "An Act concerning crimes and punishments," passed April sixteenth, eighteen hundred and fifty.

SECTION 1. Every person who shall feloniously steal, take, and carry away, or attempt to take, steal, and carry from any mining claim, tunnel, sluice, undercurrent, riffle box, or sulphurate machine, any gold dust, amalgam, or quicksilver, the property of another, shall be deemed guilty of grand larceny, and upon conviction thereof, shall be punished by imprisonment in the state prison for any term of not less than one year nor more than fourteen years. [In effect March 20, 1872. Stats. 1871-2, p. 435.]

An Act in relation to interpreters before Grand Juries.

SECTION 1. The grand jury or district attorney may require, by subpoena, the attendance of any person before the grand jury as interpreter; and the interpreter may be present at the examination of witnesses before the grand jury. [In effect March 23, 1872. Stats. 1871-2, p. 540.]

An Act to protect the wages of labor and the salaries and fees of subordinate officers.

SECTION 1. Every person who employs laborers upon the public works, and who takes, keeps, or receives any part or portion of the wages due to such laborers from the state or municipal corporation for which such work is done, is guilty of a felony.

SEC. 2. Every officer of the state, or any county, city, or township therein, who keeps or retains any part or portion of the salary or fees allowed by law to his deputy, clerk, or subordinate officer, is guilty of a felony. [In effect April 1, 1872. Stats. 1871-2, p. 951.]

An act to punish seduction.

SECTION 1. Every person who inveigles or entices any unmarried female, of previous chaste character, under the age of eighteen years, into any house of ill fame, or of assignation; or elsewhere, for the purpose of prostitution, and every person who aids or assists in such abduction for such purpose, and every person who by any false pretenses, false representation, or other fraudulent means, procures any female to have illicit carnal connection with any man, is punishable by imprisonment in the State Prison not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [Approved March 1, 1872. Stats. 1871-2, p. 184.]

An Act to prevent the sale of intoxicating drinks to minors.

SECTION 1. Every person who sells or gives to another under the age of sixteen years, to be by him drank at the time as a beverage, any intoxicating drink, is guilty of a misdemeanor, and punishable by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding three months; *provided*, that nothing in this Act shall be deemed to apply to parents of such children, or guardians of their wards, or physicians. [Approved March 4, 1872. Stats. 1871-2, p. 231.]

An Act to prevent the sale of intoxicating beverages on election days.

SECTION 1. It shall not be lawful for any person or persons keeping a public house, saloon, or drinking place, either licensed or unlicensed, to sell, give away, or furnish spirituous or malt liquors, wine, or any other intoxicating beverages, on any part of any day set apart, or to be set apart, for any general or special election by the citizens in any election district or precinct in any of the counties of the state where an election is in progress, during the hours when by law, in said district or precinct, the elections polls are required to be kept open.

SEC. 2. Any person or persons violating the provisions of this act shall be deemed guilty of a misdemeanor. [In effect March 7, 1874. Stats. 1873-4, p. 297.]

An Act for the more effectual prevention of cruelty to animals.

SECTION 1 Any three or more citizens of the state of California, who have heretofore, or who shall hereafter, incorporate as a body corporate, under the general laws for incorporations in this state, for the purpose of preventing cruelty to animals, may avail themselves of the privileges of this act; *provided*, that the corporate body first formed as aforesaid in any county, shall be the only one so entitled to the benefits and privileges of this act in said county.

SEC. 2. The said societies may make and adopt by-laws governing the admission of associates and members, providing for all meetings, and for assistant and district or local officers; providing, also, for means and systems for the effectual attainment of the objects contemplated by this act; for the regulation and management of its business affairs, and for the effectual working of the societies; prescribing, also, the duties of all their officers; for the outlay of all moneys and the auditing all accounts; *provided*, that such by-laws shall not conflict with the laws of the state of California or of the United States, or with any provisions of this act.

SEC. 3. Said societies shall elect officers and fill vacancies according to the provisions of their by-laws.

SEC. 4. All sheriffs, constables, police and peace officers are empowered to make arrests for the violation of any of the provisions of this act, which by this act is denominated a misdemeanor, in the same manner as is by law provided for arrest in all cases of misdemeanors.

SEC. 5. All members and agents, and all officers of each or any of the societies so incorporated, as shall by the trustees of said societies be duly authorized in writing, approved by the county judge of the county, and sworn in the same manner as are constables and peace officers, shall have power to lawfully

interfere to prevent the perpetration of any act of cruelty upon any dumb animal, and may use such force as may be necessary to prevent the same, and to that end may summon to their aid any bystander; they may make arrests for the violation of any of the provisions of this act. in the same manner as is herein provided for other officers; and may carry the same weapons that such officers are authorized to carry; *provided*, that all such members and agents shall, when making such arrests, exhibit and expose a suitable badge to be adopted by said society. All persons resisting said specially appointed officers, as such, shall, upon conviction, be deemed guilty of a misdemeanor.

SEC. 6. Whoever overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, cruelly beats, mutilates, or cruelly kills, or causes, or procures to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, cruelly beaten, mutilated, or cruelly killed, any animal; and whoever, having the charge or custody of any animal, either as owner or otherwise, inflicts unnecessary cruelty upon the same, or fails to provide the same with proper food, drink, shelter, or protection from the weather, or who cruelly drives the same when unfit for labor, shall, upon conviction, be deemed guilty of a misdemeanor.

SEC. 7. If any person shall carry, or cause to be carried, in or upon any vehicle, or otherwise, any domestic animal, in a cruel or inhuman manner, or knowingly and wilfully authorizes or permits the same to be subjected to unnecessary torture, suffering, or cruelty of any kind, shall, upon conviction, be deemed guilty of a misdemeanor; and whenever any such person shall be taken into custody therefor by any officer, such officer may take charge of such vehicle and its contents, together with the horse or team attached to said vehicle, and deposit the same in some safe place of custody; and any necessary expenses which may be incurred for taking care of and keeping the same, shall be a lien thereon, to be paid before the same can be lawfully recovered; and if the said expenses, or any part thereof, remain unpaid, they may be recovered, by the person incurring the same, of the owner of said domestic animal, in any action therefor.

SEC. 8. Any person who shall cause any bull, bear, cock, dog, or other animal to fight, for his amusement or for gain, worry or injure each other; or any person who shall permit the same to be done on any premises under his charge or control; and any person who shall aid, abet, or be present at such fighting and worrying of such animal, as a spectator, shall, upon conviction, be deemed guilty of a misdemeanor.

SEC. 9. Whoever owns, possesses, keeps, or trains any bird

or animal, with the intent that such bird or animal shall be engaged in an exhibition of fighting, or is present at any place, building, or tenement, where preparations are being made for an exhibition of the fighting of birds or animals, with the intent to be present as such exhibition, or is present at such exhibition, shall, upon conviction, be deemed guilty of a misdemeanor.

SEC. 10. When complaint is made, on oath, to any magistrate authorized to issue warrants in criminal cases, that the complainant believes that any of the provisions of law relating to or in any way affecting dumb animals, are being or are about to be violated in any particular building or place, such magistrate shall issue and deliver immediately a warrant directed to any sheriff, constable, police or peace officer, or officer of any incorporated association qualified, as provided in the fifth section of this act, authorizing him to enter and search such building or place, and to arrest any person or persons there present violating, or attempting to violate, any law relating to or in any way affecting dumb animals, and to bring such person or persons before some court or magistrate of competent jurisdiction, within the city or township within which such offense has been committed, to be dealt with according to law, and such attempt shall be held to be a violation of section six of this act.

SEC. 11. Any sheriff, constable, police or peace officer, or officer qualified, as provided in section five of this act, may enter any place, building, or tenement, where there is an exhibition of the fighting of birds or animals, or where preparations are being made for such an exhibition, and, without a warrant, arrest all persons there present.

SEC. 12. Any person who shall impound, or cause to be impounded in any pound, any domestic animal, shall supply the same during such confinement with a sufficient quantity of good and wholesome food and water, and in default thereof, shall, upon conviction, be deemed guilty of a misdemeanor. In case any domestic animal shall be at any time impounded, as aforesaid, and shall continue to be without necessary food and water for more than twelve consecutive hours, it shall be lawful for any person, from time to time, as it shall be deemed necessary, to enter into and upon any pound in which any such domestic animal shall be confined, and supply it with necessary food and water so long as it shall remain so confined. Such person shall not be liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such animal, and the said animal shall not be exempt from levy and sale upon execution issued upon a judgment therefor.

SEC. 13. Every owner, driver, or possessor of any old,

maimed, or diseased horse, mule, cow, or other domestic animal, who shall permit the same to go loose in any lane, street, square, or lot, of any city or township, without proper care and attention, for more than three hours after knowledge thereof, shall, on conviction, be deemed guilty of a misdemeanor; *provided*, that this shall not apply to such owner keeping any old or diseased animal belong to him on his own premises with proper care. Every sick, disabled, infirm, or crippled horse, ox, mule, cow, or other domestic animal, which shall be abandoned on the public highway, or in any open space in any city or township, may, if after due search by a peace officer, or officer of said society, no owner can be found therefor, be killed by such officer; and it shall be the duty of all peace and public officers to cause the same to be killed on information of such abandonment.

SEC. 14. Every person convicted of any misdemeanor under this act, shall be punished as is by law provided for the punishment of misdemeanors; and all fines imposed or collected in any county, under the provisions of this act, shall inure to the society in said county, organized and incorporated as herein provided, in aid of the benevolent object for which it is incorporated.

SEC. 15. All prosecutions for the violation of any of the provisions of this act shall be conducted and prosecuted in a court of competent jurisdiction, and any member of said society authorized, as provided in section five of this act, may appear and prosecute in any of said courts, for any violation of any of the provisions of this act, whether or not he be an attorney or counselor at law; *provided*, that all such prosecutions shall be conducted in the name of the people of the state of California.

SEC. 16. In this act the singular shall include the plural; the word "animal" shall be held to include every living dumb creature; the words "torture," "torment," and "cruelty," shall be held to include every act, omission, or neglect whereby unnecessary or unjustifiable physical pain or suffering is caused or permitted, and the words "owner" and "person" shall be held to include corporations as well as individuals; and the knowledge and acts of agents of and persons employed by corporations, in regard to animals transported, owned, or employed by, or in the custody of such corporations, shall be held to be the act and knowledge of such corporations as well as such agent or employees.

SEC. 17. No part of this act shall be deemed to interfere with any of the laws of this state known as the "game laws," or any laws for the destruction of certain birds; nor shall this act be deemed to interfere with the right to destroy any venomous reptiles, or any animal known as dangerous to life, limb, or property, or to interfere with the right to kill all animals

used for food, or with any properly conducted scientific experiments or investigations, which experiments or investigations shall be performed only under the authority of the faculty of some regularly incorporated medical college or university of the state of California.

SEC. 18. The act entitled "an act for the more effectual prevention of cruelty to animals," approved March thirtieth, eighteen hundred and sixty-eight, and amendments thereto, approved March fifteenth, eighteen hundred and seventy-two, are hereby repealed. [In effect March 20, 1874. Stats. 1873-4, p. 499.]

An Act for the protection of buoys and beacons.

SECTION 1. Any person or persons who shall moor any vessel or boat of any kind, or any raft or scow, to any buoy or beacon placed in the waters of California by authority of the United States Lighthouse Board, or shall in any manner hang on to the same, with any vessel, boat, raft, or scow, or shall wilfully remove, damage, or destroy any such buoy or beacon, or any part of the same, or shall cut down, remove, damage, or destroy any beacon or beacons erected on land in this state by the authority aforesaid, shall, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof before any court of competent jurisdiction, be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months; one third of the fine in such case to be paid to the informer, and two thirds thereof to the Lighthouse Board, to be used in repairing said buoys and beacons.

SEC. 2. The cost of repairing or replacing any such buoy or beacon which may have been misplaced, damaged, or destroyed by any vessel, boat, raft, or scow being made fast to the same, shall, when said cost shall have been legally ascertained, be a lien upon such vessel, boat, raft, or scow, and recovered against the same, and the owner or owners thereof, in any action of debt, in any court of competent jurisdiction in this state. [In effect March 26, 1874. Stats. 1873-4, p. 619.]

An Act to enforce the educational rights of children.

SECTION 1. Every parent, guardian, or other person in the state of California having control and charge of any child or children between the ages of eight and fourteen years, shall be required to send any such child or children to a public school for a period of at least two thirds of the time during which a public school shall be taught in each city, or city and county, or school district, in each school year, commencing on the first day of July in the year of our Lord one thousand eight hundred and seventy-four, at least twelve weeks of which shall be

consecutive, unless such child or children are excused from such attendance by the board of education of the city or city and county, or of the trustees of the school district in which such parents, guardians, or other persons reside, upon its being shown to their satisfaction that his or her bodily or mental condition has been such as to prevent attendance at school, or application to study for the period required, or that the parents or guardians are extremely poor, or sick, or that such child or children are taught in a private school, or at home, in such branches as are usually taught in the primary schools of this state, or have already acquired a good knowledge of such branches; *provided*, in case a public school shall not be taught for three months during the year, within one mile by the nearest traveled road, of the residence of any person within the school district, he shall not be liable to the provisions of this act.

SEC. 2. It shall be the duty of the president of each board of education, and of the clerk of each board of district trustees in the state of California to cause to be posted three notices of this law in the most public places in the city, or city and county, or in the school district, or published in one newspaper therein for three weeks, in the month of June in each year; the expense of each publication to be paid out of the school funds of such city, or city and county, or school district, as the case may require.

SEC. 3. In case any parent, guardian, or other person shall fail to comply with the provisions of this act, said parent, guardian, or other person shall be deemed guilty of a misdemeanor, and shall be liable to a fine of not more than twenty dollars; and for the second and each subsequent offense the fine shall not be less than twenty dollars nor more than fifty dollars; and the parent, guardian, or other person so convicted, shall pay all costs. Each such fine shall be paid to the clerk of the proper board of education, or of the district trustees.

SEC. 4. And it shall be duty of the clerk of each board of education and of each board of district trustees, on complaint of any teacher or taxpayer, to prosecute all offenses occurring under the provisions of this act; and any clerk neglecting to prosecute such offense within ten days after a written notice has been served on him by any teacher or taxpayer within the limits of the authority of said board, unless the person so complained of shall be excused by the proper school board, shall himself be liable to a fine of not less than twenty dollars nor more than fifty dollars, which fine shall be prosecuted for in the name of the people of the state of California, and the fine so collected shall be paid over to the clerk of the board of education or trustees of the proper city, or city and county, or school district, to be accounted for as in section three of this

act; and in case such prosecution fail, the expenses thereof shall be paid out of the school fund of the city, or city and county, or school district, in which the case arose.

SEC. 5. And it shall be the duty of the census marshal to furnish each board of education and of district trustees, with a complete list of all children living within the jurisdiction of said board, and to note on such lists all children not attending colleges, college schools, private schools, or being taught at home, who are liable to the provisions of this act; and each teacher teaching within the limits of the jurisdiction of such board, shall be supplied with a list of all children within his or her department or school, and shall call such list each morning on the opening of school, and note the absentees, and the reason of such absence, if any, and at the close of each term of twelve weeks, shall make a full report to the board of education, or of district trustees, of all such cases of absence, with the names both of children and parents, guardians, or other persons having such children in charge, and said board shall thereupon forthwith proceed to prosecute such parents, guardians, or other persons, according to the provisions of this act.

SEC. 6. And whereas, the state has provided an institution for the gratuitous instruction of all resident deaf and dumb or blind children between the ages of six and twenty-one years, every parent or guardian of any child or children afflicted with deafness or blindness, shall be required, under the penalties hereinbefore specified, to send such child or children to said institution for a period of not less than five years, unless such child or children shall have been excused by the authorities, and on the grounds specified in section one of this act.

SEC. 7. Any justice of the peace of the proper city, or city and county, or school district, shall have jurisdiction of all offenses committed under the provisions of this act. [Approved March 28. In effect July 1, 1874. Stats. 1873-4, p. 751.]

An Act to encourage the planting and cultivation of oysters.

SECTION 1. Any citizen of the United States may lay down and plant oysters in any of the bays, rivers, or public waters of this state; and the ownership of and the exclusive right to take up and carry off the same shall be continued and remain in such person or persons who shall have laid down and planted the same.

SEC. 2. Any person or persons who now have or who may hereafter lay down and plant oysters, as hereinbefore provided, shall stake or fence off the land on which the same is or hereafter may be laid down and planted, and such stakes or fences

shall be sufficient marks of the boundaries and limits, and entitle such person or persons to the exclusive use and occupation thereof for the purposes prescribed in this act; *provided*, that nothing herein contained shall be deemed to authorize any impediments or obstructions to the navigation of any channels.

SEC. 3. Parties planting or laying down such oyster beds shall record a full description of said bed or beds, in the county recorder's office in the county where the same is situated. The recorder shall record the description so furnished, in a book to be kept by him for that purpose, to be entitled a "record of oyster beds."

SEC. 4. Any person or persons who shall enter upon any lot of land in which there shall be oysters laid down and planted, and which at the time of such entry shall be fenced or staked off pursuant to the provisions of this act, and who shall take up and carry off therefrom such oysters, without the consent or permission of the occupants and owners thereof, and shall wilfully destroy or remove, or cause to be removed or destroyed, any stakes, marks, or fences intended to designate the boundaries and limits of any land claimed and staked or fenced off pursuant to the provisions of this act, shall be guilty of a misdemeanor.

SEC. 5. The penalties of the penal code relative to misdemeanors are hereby made applicable to any violation of the provisions of this act.

SEC. 6. All fines and penalties collected for a violation of any of the provisions of this act, over and above the costs of suit, shall be paid into the common school fund of the county where the offense was committed.

SEC. 7. All parties availing themselves of the provisions of this act shall erect, or cause to be erected, on some conspicuous part of the grounds devoted to the planting of oysters, a sign not less than six feet in length and one foot in width, on which shall be painted in black letters upon a white ground, the words "oyster beds."

SEC. 8. All acts and parts of acts in conflict with the provisions of this act, and especially "an act entitled an act concerning oysters," passed April twenty-eight, one thousand eight hundred and fifty-one, as also the act entitled "an act concerning oyster beds," approved April second, one thousand eight hundred and sixty-six, are hereby repealed.

SEC. 9. This act shall not apply to any tide lands which the state may have sold to private parties; *provided, further*, that nothing herein shall be so construed as to interfere with the right of the state to sell and dispose of any of the tide lands, nor to affect in any manner the rights of purchasers at any sale of tide lands by the state. [In effect March 30, 1874. Stats. 1873-4, p. 940.]

An Act to protect lumber manufacturers.

SECTION 1. Every person who maliciously drives into, or places within any saw-log, shingle-bolt, or other wood, any iron, steel, or other substance sufficiently hard to injure saws, knowing that the said saw-log, shingle-bolt, or other wood, is intended by the owner thereof to be manufactured into any kind of lumber, is guilty of a felony, and shall be punished by imprisonment in the state prison not less than one nor more than five years. [In effect February 9, 1876. Stats. 1875-6, p. 32.]

An Act to prevent the leaving open of inclosures, and hunting on inclosed lands.

SECTION 1. Every person who shall open any gate, bars, or fence of another, for the purpose of passing through, and shall willfully leave the same open, without the permission of the owner, is guilty of a misdemeanor.

SEC. 2. Every person who willfully opens, tears down, or otherwise destroys any fence on the inclosed land of another, is guilty of a misdemeanor.

SEC. 3. Every person who willfully enters upon the inclosed land of another for the purpose of hunting, or who discharges fire-arms, or lights camp-fires thereon, without first having obtained permission of the owner or occupant of said land, is guilty of a misdemeanor.

SEC. 4. Every person who willfully, carelessly, or negligently, while hunting or camping upon the inclosed land of another, kills, maims, or wounds an animal, the property of another, is guilty of a misdemeanor.

SEC. 5. Every person who, upon departing from camp, willfully leaves the fire or fires burning or unextinguished, is guilty of a misdemeanor.

SEC. 6. Every person found guilty of any of the misdemeanors herein mentioned shall be fined not less than twenty nor more than fifty dollars, and shall be imprisoned in the county jail until such fine be satisfied, not exceeding one day for every two dollars thereof.

SEC. 7. All acts and parts of acts in conflict herewith are repealed; *provided, however*, nothing herein contained shall be construed as repealing section five hundred and ninety-four of the penal code.

SEC. 8. Section three of this act shall not apply to the counties of Los Angeles, San Diego, Sutter, San Benito, Del Norte, El Dorado, Colusa, Yuba, Humboldt, Amador, Tuolumne, San Luis Obispo, Plumas, Lassen, Siskiyou, Modoc, Shasta, Trinity, Sierra, Placer. [In effect March 23, 1876. Stats. 1875-6, p. 403.]

An Act concerning lodging houses and sleeping apartments.

SECTION 1. Every person who owns, leases, lets, or hires, to any person or persons, any room or apartment in any building, house or other structure, within the limits of any incorporated city, or city and county, within the state of California, for the purpose of a lodging or sleeping apartment, which room or apartment contains less than five hundred cubic feet of space, in the clear, for each person so occupying such room or apartment, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine of not less than fifty (50) dollars or more than five hundred (500) dollars, or by imprisonment in the county jail, or by both such fine and imprisonment.

SEC. 2. Any person or persons found sleeping or lodging, or who hires or uses for the purpose of sleeping in, or lodging in, any room or apartment which contains less than five hundred (500) cubic feet of space, in the clear, for each person so occupying such room or apartment, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not less than ten (10) or more than fifty (50) dollars, or by both such fine and imprisonment.

SEC. 3. It shall be the duty of the chief of police (or such other person to whom the police powers of a city are delegated) to detail a competent and qualified officer or officers of the regular force to examine into any violation of any of the provisions of this act, and to arrest any person guilty of any such violation.

SEC. 4. The provisions of this act shall not be construed to apply to hospitals, jails, prisons, insane asylums, or other public institutions.

SEC. 5. All acts or parts of acts in conflict with the provisions of this act are hereby repealed. [In effect April 3, 1876. Stats. 1875-6, p. 759.]

An Act for the incorporation of societies for the prevention of cruelty to children.

SECTION 1. Any five or more persons of full age, a majority of whom shall be citizens and residents within the State, who shall desire to associate themselves together for the purpose of preventing cruelty to children, may make, sign, and acknowledge, before any person authorized to take acknowledgments of deeds of this state, and file in the office of the secretary of state, and, also, in the office of the clerk of the county in which the business of the society is to be conducted, a certificate in writing, in which shall be stated the name or title by which said society shall be known in law, the particular business and objects of such society, the number of trustees, di-

rectors, or managers, to manage the same, and the names of the trustees, directors, or managers of the society for the first year of its existence; but such certificate shall not be filed unless the written consent and approbation of the district judge of the district in which the place of business or principal office of such society shall be located, be indorsed on such certificate.

SEC. 2. Upon filing the certificate as aforesaid, the persons who shall have signed and acknowledged such certificate, and their associates and successors, shall thereupon, by virtue of this act, be a body politic and corporate by its name stated in such certificate, and as such shall have power:

First—To have perpetual succession by its corporate name.

Second—To sue and be sued, complain and defend, in any court of law or equity.

Third—To make and use a common seal, which may be affixed by making an impression directly in the paper, and alter the same at pleasure.

Fourth—To appoint such officers, managers, and agents, as the business of the corporation may require.

Fifth—To make by-laws, not inconsistent with the laws of this state or of the United States, for the management of its property and the regulation of its affairs.

Sixth—To contract and be contracted with.

Seventh—To take and hold by gift, purchase, grant, devise, or bequest, any property, real or personal, and the same to dispose of at pleasure. But such a corporation shall not, in its corporate capacity, hold real estate the yearly income derived from which shall exceed the sum of fifty thousand dollars.

Eighth—To exercise any corporate powers necessary for the exercise of the powers above enumerated and given.

SEC. 3. Any society so incorporated may prefer a complaint before any court or magistrate having jurisdiction, for the violation of any law relating to or affecting children, and may aid in bringing the fact before such court or magistrate in any proceeding taken.

SEC. 4. All magistrates, constables, sheriffs, and officers of police shall, as occasion may require, aid the society so incorporated, its officers, members, and agents, in the enforcement of all laws which now are or may hereafter be enacted relating to or affecting children.

SEC. 5. The provisions of this act shall not extend or apply to any association or individuals who shall, in the certificate filed as hereinabove provided, use or specify a name or style the same, or substantially the same, as that of any previously existing incorporated society in this state. [In effect April 3. 1876. Stats. 1875-6, p. 890.]

An Act imposing certain duties upon the governor of the state.

SECTION 1. The governor shall offer a standing reward of three hundred dollars (\$300) for the arrest of each person engaged in the robbery of, or in an attempt to rob any person or persons upon, or having in charge, in whole or in part, any stage coach, wagon, railroad train, or other conveyance engaged at the time in carrying passengers, or any private conveyance within this State; the reward to be paid to the person or persons making the arrest, immediately upon the conviction of the person or persons so arrested; but no reward shall be paid except after such conviction. [In effect April 3, 1876. Stats. 1875-6, p. 855.]

An Act to regulate the use of artesian wells, and to prevent the waste of subterranean waters in this State.

SECTION 1. Any artesian well which is not capped, or furnished with such mechanical appliance as will readily and effectively arrest and prevent the flow of water from such well, is hereby declared to be a public nuisance. The owner, tenant, or occupant of the land upon which such well is situated, who causes, permits, or suffers such public nuisance, or suffers or permits it to remain or continue, is guilty of a misdemeanor r.

SEC. 2. Any person owning, possessing, or occupying any land upon which is situated an artesian well, who causes, suffers, or permits the water to unnecessarily flow from such well, or to go to waste, is guilty of a misdemeanor.

SEC. 3. An artesian well is defined, for the purposes of this act, to be any artificial well the waters of which will flow continuously over the natural surface of the ground adjacent to such well at any season of the year.

SEC. 4. Waste is defined, for the purposes of this act, to be the causing, suffering, or permitting the waters flowing from such well to run into any river, creek, or other natural water-course or channel, or into any bay, lake, or pond, or into any street, road, highway, or upon the land of any person other than that of the owner of such well, or upon public lands of the United States or of the state of California, unless it be used thereon for the purposes and in the manner that it may be lawfully used upon the land of the owner of such well; *provided*, that this section shall not be so construed as to prevent the use of such waters for the proper irrigation of trees standing along or upon any street, road, or highway, or for ornamental ponds or fountains, or the propagation of fish.

SEC. 5. Any person violating any of the provisions of this act may be proceeded against for a misdemeanor in any justice's court of the county in which such well is located, and shall, upon conviction, be fined for each offense not less than

ten or more than fifty dollars. There shall, also, upon conviction had, in addition to such fine, be taxed against such party the cost of prosecution. Such fine and costs may be collected as in other criminal cases, and the justice may also issue an execution upon the judgment therein rendered, and the same may be enforced and collected as in civil cases.

SEC. 6. It shall be the duty of the supervisors or roadmasters, on complaint of any citizen within their respective districts, and for that purpose may at all proper times enter upon the premises where such well is situated; and it shall be his duty to institute, or cause to be instituted, criminal action for all violations of the provisions of this act, or for all public offenses defined in this act, committed within such district.

SEC. 7. An act entitled "an act to regulate the use of artesian wells, and to prevent the waste of subterranean waters in Santa Clara and Los Angeles counties," approved March eighteenth, eighteen hundred and seventy-six, and all other acts and parts of acts in conflict with the provisions of this act, are hereby repealed.

SEC. [8.] This act shall not apply to artesian wells in the county of San Bernardino. [Approved March 9, 1878. In effect July 1, 1878. Stats. 1877-8, p. 195.]

An Act to prohibit "Piece Clubs," and to prevent extortion from candidates for office.

SECTION 1. All payments and contributions of money for election expenses, made by candidates for office in this state, shall hereafter be assessed and made by such candidates by voluntary assessment among themselves, and not otherwise, and at meetings to be called for such purpose, at which meetings none but candidates for office at the next ensuing election shall be present or participate.

SEC. 2. Any person being a candidate for office in this state, who shall directly or indirectly pay, or knowingly cause to be paid, any money or other valuable thing to any person, as an assessment or contribution for the expenses of the election at which such person or candidate is to be voted for, except the contribution or assessment so agreed upon by such meeting of candidates, shall be deemed guilty of a misdemeanor, and, upon conviction, punished accordingly.

SEC. 3. It shall not be lawful for any committee, convention, or other association, formed for the purpose of nominating a candidate or candidates for office in this state, to levy, assess, collect, demand, or receive, directly or indirectly, any money or other valuable thing from any candidate or candidates nominated for office by such committee, convention, or other association, either for the expenses of printing or

distributing tickets, or for any of the expenses of the election of such candidate or candidates, or as or for the expenses of such nominating convention, committee, or other association, or under or upon any pretense whatsoever.

SEC. 4. Any officer or member of any such committee, convention, or association, or other person, who shall vote for, aid, authorize, assist, or consent to any such levy, assessment, or collection from any candidate or candidates, shall be deemed guilty of a misdemeanor, and, on conviction, punished accordingly.

SEC. 5. Any person who shall demand, ask for, collect, or receive, either directly or indirectly, any money or other valuable thing from any candidate or candidates for office in this state, on the ground that such money or other valuable thing has been assessed to such candidate or candidates, or asked for, demanded, or required by any person, nominating convention, committee, or other political association, as or for the costs of printing or distributing tickets, or for the payment of election expenses of any kind or nature whatsoever, or as or for the expenses of such nominating committee, convention, or association, shall, for each offense, be deemed guilty of a misdemeanor, and, on conviction, shall be punished accordingly; but nothing herein contained shall prevent the candidates at any election from assembling together and voluntarily assessing themselves for any expenses authorized by law for the common good of the ticket, and to collect and disburse the same by agents appointed for such purpose.

SEC. 6. Any person who shall voluntarily and unsolicited offer to work for and assist, or in any manner whatsoever contribute to the nomination or election of any candidate or other person to any office in this state, for the purpose and with the intent to have such candidate or person pay for, or in any manner compensate such person so offering for such work or services, shall be deemed guilty of a misdemeanor, and, on conviction, punished accordingly.

SEC. 7. This act shall apply only to the city and county of San Francisco. [In effect Mar. 14, 1878. Stats. 1877-8, p. 236.]

An Act to prevent the sale of oleomargarine under the name of and pretense that said commodity is butter.

SECTION 1. Every person who sells, or keeps for sale, or offers for sale, or otherwise disposes of any quantity of oleomargarine, under the name of, or under the pretense that the same is butter, or shall keep for sale, or manufacture any quantity of oleomargarine, without branding the same, or the package in which it is contained, with the word oleomargarine, shall be deemed guilty of a misdemeanor, and on conviction thereof before a court of competent jurisdiction, shall be pun-

ishable by imprisonment in the county jail for a term not less than fifty nor more than two hundred days, or by fine not less than fifty nor more than two hundred dollars, or by both such fine and imprisonment. [In effect March 26, 1878. Stats. 1877-8, p. 535.]

An Act to punish and prohibit the sale of adulterated syrup.

SECTION 1. Any person who shall knowingly sell, or keep, or offer for sale, or otherwise dispose of any syrup, or golden drips syrup, silver drips syrup, or molasses, containing muriatic or sulphuric acids, or glucose, or adulterated with any other substance to improve the color thereof, shall be guilty of a misdemeanor.

SEC. 2. Any person violating the provisions of section one of this act shall be punished, and imprisoned in the county jail of the county in which the offense was committed, for a period not exceeding six months or by a fine not exceeding five hundred dollars, or both. [In effect March 29, 1878. Stats. 1877-8, p. 695.]

An Act to protect stockholders and persons dealing with corporations in this State.

SECTION 1. Any superintendent, director, secretary, manager, agent, or other officer, of any corporation formed or existing under the laws of this state, or transacting business in the same, and any person pretending or holding himself out as such superintendent, director, secretary, manager, agent, or other officer, who shall wilfully subscribe, sign, indorse, verify, or otherwise assent to the publication, either generally or privately, to the stockholders or other persons dealing with such corporation, or its stock, any untrue or wilfully and fraudulently exaggerated report, prospectus, account, statement of operations, values, business, profits, expenditures, or prospects, or other paper or document intended to produce or give, or having a tendency to produce or give, to the shares of stock in such corporation a greater value, or less apparent or market value than they really possess, or with the intention of defrauding any particular person or persons, or the public, or persons generally, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by imprisonment in the state prison or a county jail not exceeding two years, or by fine not exceeding five thousand dollars, or by both; *provided*, that this act shall be construed to apply only to corporations whose capital stock has been or shall hereafter be listed at a stock board or stock exchange in this state, or whose shares be regularly bought and sold in the stock market of this state. Approved March 29, 1878. Stats. 1877-8, p. 695.]

An Act for the protection of children, and to prevent and punish certain wrongs to children.

SECTION 1. No minor, under the age of sixteen years, shall be admitted at any time to, or permitted to remain in, any saloon or place of entertainment where any spirituous liquors, or wines, or intoxicating or malt liquors are sold, exchanged, or given away, or at places of amusement known as dance-houses and concert saloons, unless accompanied by parent or guardian. Any proprietor, keeper, or manager of any such place who shall admit such minor to, or permit him or her to remain in any such place, unless accompanied by parent or guardian, shall be guilty of a misdemeanor.

SEC. 2. Every person having the care, custody, or control of any child under the age of sixteen years, shall restrain such child from begging, whether actually begging, or under the pretext of peddling. Any person offending against this section shall be arrested and brought before a court or magistrate, and for the first offense shall be reprimanded, and for each subsequent offense shall be guilty of a misdemeanor.

SEC. 3. Any child, apparently under the age of sixteen years, that comes within any of the following descriptions, named:

(a) That is found begging, or receiving, or gathering alms (whether actually begging, or under the pretext of selling, or offering for sale, anything), or being in any street, road, or public place for the purpose of so begging, gathering, or receiving alms.

(b) That is found wandering and not having any house or settled place of abode, or proper guardianship, or visible means of subsistence.

(c) That is found destitute, either being an orphan, or having a vicious parent, who is undergoing penal servitude or imprisonment.

(d) That frequents the company of reputed thieves or prostitutes, or houses of prostitution or assignation, or dance-houses, concert saloons, theaters, and varieties, or places specified in the first section of this act, without parent or guardian, shall be arrested and brought before a court or magistrate.

When, upon examination before a court or magistrate, it shall appear that any such child has been engaged in any of the aforesaid acts, or comes within any of the aforesaid descriptions, such court or magistrate, when it shall deem it expedient for the welfare of the child, may commit such child to an orphan asylum, society for the prevention of cruelty to children, charitable or other institution, or make such other disposition thereof as now is or may hereafter be provided by law in cases of vagrant, truant, disorderly, pauper, or destitute children.

SEC. 4. No child under restraint or conviction, apparently under the age of sixteen years, shall be placed in any prison, or place of confinement, or in any court-room, or in any vehicle for transportation to any place, in company with adults charged with or convicted of crime, except in the presence of a proper official. [In effect Mar. 30, 1878. Stats. 1877-8, p. 812.]

An Act relating to children.

SECTION 1. Any person, whether as parent, relative, guardian, employer, or otherwise, having the care, custody, or control of any child under the age of sixteen years, who shall exhibit, use, or employ, or who shall in any manner, or under any pretense, sell, apprentice, give away, let out, or otherwise dispose of any such child to any person, under any name, title, or pretense, in or for the vocation, occupation, service, or purpose of singing, playing on musical instruments, rope or wire walking, dancing, begging, or peddling, or as a gymnast, acrobat, contortionist, or rider, in any place whatsoever, or for or in any obscene, indecent, or immoral purpose, exhibition, or practice whatsoever, or for or in any mendicant or wandering business whatsoever, or for or in any business, exhibition, or vocation injurious to the health, or dangerous to the life or limb, of such child; or who shall cause, procure, or encourage any such child to engage therein, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty nor more than two hundred and fifty dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment; *provided*, that nothing in this section contained shall apply to or affect the employment or use of any such child, as a singer or musician in any church, school, or academy, or the teaching or learning of the science or practice of music; or the employment of any such child as a musician at any concert or other musical entertainment, on the written consent of the mayor of the city or president of the board of trustees of the town where such concert or entertainment shall take place.

SEC. 2. Every person who shall take, receive, hire, employ, use, exhibit, or have in custody, any child under the age, and for any of the purposes mentioned in the preceding section, shall be guilty of a like offense and punished by a like punishment as therein provided.

SEC. 3. When, upon examination before any court or magistrate, it shall appear that any child, within the age previously mentioned in this act, was engaged, or used for or in any business, or exhibition, or vocation, or purpose designated, and as mentioned in this act, and when upon the conviction of any person having the custody of a child of a criminal assault upon

it, the court or magistrate before whom such conviction is had, shall deem it desirable for the welfare of such child that the person so convicted should be deprived of its custody thereafter, such court or magistrate may commit such child to any orphan asylum, society for the prevention of cruelty to children, charitable or other institution, or make such other disposition thereof as now is, or hereafter may be, provided by law in cases of vagrant, truant, disorderly, pauper, or destitute children.

SEC. 4. Whoever shall wilfully cause or permit any child to suffer, or who shall inflict thereon unjustifiable physical pain or mental suffering, and whoever, having the care or custody of any child, shall wilfully cause or permit the life or limb of such child to be endangered, or the health of such child to be injured, or any person who shall wilfully cause or permit such child to be placed in such a situation that its life or limb may be endangered, or its health shall be likely to be injured, shall be guilty of a misdemeanor.

SEC. 5. All fines, penalties, and forfeitures imposed and collected in any county of this state, under the provisions of this and every act passed, or which may be passed, relating to or affecting children, in every case where the prosecution was instituted or conducted by a society incorporated pursuant to the provisions of chapter five hundred and forty-nine of the statutes of 1875-6, approved April 3d, 1876, being an act entitled "an act for the incorporation of societies for the prevention of cruelty to children," shall, except where otherwise provided, enure to such society in aid of the purposes for which it was incorporated. [In effect March 30, 1878. Stats. 1877-8, p. 813.]

An Act concerning the payment of the expenses and costs of the trial of convicts for crimes committed in the State Prison, and to pay the costs of the trial of escaped convicts, and to pay for the expenses of Coroner inquests in said prison.

[Approved April 12, 1880.]

SECTION 1. The costs and expenses of all trials which have heretofore been had in the county in this state where the state prison is situated, for any crime committed by any convict in the state prison, and the costs of guarding and keeping such convict, and the execution of the sentence of said convict by said county, and the costs and expenses of all trials heretofore had for the escape of any convict from the state prison, and the costs and expenses of all coroner inquests heretofore had of any convict at the state prison by the county where said

prison has been situated, shall be certified to by the county clerk of said county wherein said trials and inquests have been held to the board of state prison directors for their approval, and after such approval they shall pay the same out of the money appropriated for the support of the state prison, to the county treasurer of said county where said trials have been had; "provided, that this act shall not apply to any costs or expenses incurred since January first, eighteen hundred and seventy-three."

SEC. 2. This act shall only apply to cases which have not been settled for by the state.

SEC. 3. This act shall take effect immediately.

An Act supplemental to and amendatory of an Act entitled "An Act to regulate the practice of medicine in the State of California," approved April 3d, 1876.

SEC. 7. Any person practicing medicine or surgery in this state, without first having procured a certificate to so practice from one of the boards of examiners appointed by one of the societies mentioned in section two of this act, shall be deemed guilty of a misdemeanor, and shall be subject to the penalties provided in section thirteen of the act to which this act is amendatory and supplemental, but no person who holds a certificate from one of such boards of examiners, or who holds a certificate heretofore granted by the board of examiners heretofore existing by virtue of appointment by the California state medical society of homeopathic practitioners, shall be compelled to procure a new certificate. And all powers and privileges of said boards of examiners, under the act to which this act is supplemental and amendatory, are hereby transferred to the boards of examiners created by this act.

SEC. 8. Any person assuming to act as a member of a board of examiners, under this act or under the act to which this act is supplemental and amendatory, or who shall sign, or subscribe, or issue, or cause to be issued, or seal, or caused to be sealed, a certificate authorizing any person to practice medicine or surgery in this state, except the person so acting and doing be appointed by one of the societies mentioned in section two of this act, or be authorized so to do by a board of examiners appointed by one of said societies, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than fifty dollars, or by imprisonment in the county jail for a period of not less than thirty nor more than three hundred and sixty-five days, or by both such fine and imprisonment. [In effect April 1, 1878. Stats. 1877-8, pp. 920-21.]

An Act in relation to warehouse and wharfinger receipts, and other matters relating thereto.

SEC. 10. Any warehouseman, wharfinger, person, or persons, who shall violate any of the foregoing provisions of this act, is guilty of felony, shall be subject to indictment, and, upon conviction, shall be fined in a sum not exceeding five thousand dollars (\$5,000), or imprisonment in the state prison of this state not exceeding five years, or both. And all and every person aggrieved by the violation of any of the provisions of this act may have and maintain an action against the person or persons violating any of the foregoing provisions of this act, to recover all damages, immediate or consequent, which he or they may have sustained by reason of any such violation as aforesaid, before any court of competent jurisdiction, whether such person shall have been convicted under the act or not. [Approved April 1, 1878. Stats. 1877-8, p. 950.]

An Act in relation to the House of Correction of the City and County of San Francisco.

SECTION 1. The board of supervisors of the city and county of San Francisco are hereby authorized to maintain and support in said city and county the institution now existing therein, and known as the house of correction, and to make additions thereto as the same may be required, and also to make all proper rules and regulations for the discipline, management, and employment of persons committed to said house of correction, by any court of said city and county.

SEC. 2. In making rules and regulations, as provided in the preceding section, the board of supervisors shall endeavor, as far as possible, to prevent crime, reform prisoners, and make the house of correction self-supporting.

SEC. 3. All persons appearing for sentence in the police judge's court, the city criminal court, or the municipal criminal court of the city and county of San Francisco, who might be sentenced to imprisonment in the county jail, or in the state prison, may, instead thereof, be by the proper court sentenced to imprisonment in the house of correction, in said city and county, subject, however, to the provisions of the next section; and no person shall be sentenced to imprisonment in the house of correction except under the provisions of this act.

SEC. 4. No person shall be sentenced to imprisonment in the house of correction for a shorter or longer term than that for which he might be sentenced in the county jail, or in the state prison, and in no case whatever for a shorter term than three months, nor for a longer term than three years. No person who might be sentenced to imprisonment in the state prison shall be sentenced to imprisonment in the house of cor-

rection, if he is more than twenty-five years of age, if he has been once before convicted of a felony, or twice before convicted of petit larceny, nor unless, in the opinion of the court, imprisonment in the house of correction will be more for his interest than imprisonment in the state prison, and equally for the interest of the public. The fact of a previous conviction may be found by the court upon evidence introduced at the time of sentence.

SEC. 5. Persons imprisoned in the house of correction may be put to work on the public works and other property of the city and county of San Francisco, or may be employed at any other work, as the board of supervisors of said city and county may direct. And the said board of supervisors may, so far as a due regard to economy will permit, provide for the learning of trades by persons whose terms of imprisonment in said house of correction are of sufficient length, and who have the capacity requisite therefor, and will work industriously thereat.

SEC. 6. The superintendent shall give his personal attention to the duties of his office, and shall reside at the house of correction, and the board of supervisors shall provide therein room and board for him, and for the subordinates whose presence may be required in and about said house.

SEC. 7. The third section of an act entitled "an act to utilize the prison labor and govern the house of correction of the city and county of San Francisco," approved March thirty-first, eighteen hundred and seventy-six, and all acts and parts of acts, so far as they are inconsistent with this act, are hereby repealed; *provided*, that all offenses committed before this act takes effect shall be inquired of, prosecuted, and punished in the same manner as if this act had not passed.

SEC. 8. Every person who shall, at the time of the passage of this act, be confined in the house of correction under or by virtue of a sentence of imprisonment in the county jail, may remain in the house of correction till his term of imprisonment shall expire, and, so far as relates to him, the house of correction shall be deemed to be the county jail, and he shall be in the charge and keeping of the superintendent, who shall have the same power over him that the sheriff might exercise if he was in fact in the county jail. While any such person shall be in charge of the superintendent as above provided, the sheriff shall be under no responsibility in regard to him; but nothing herein shall prevent the sheriff from removing at any time any such person from the house of correction to the county jail. Nothing in this act shall be construed to abolish or in any way to interfere with the government or control of the county or branch county jails of said city and county by the sheriff of said city and county. [Approved April 1, 1878. Stats. 1877-8, p. 953. In effect thirty days after passage.]

An Act imposing a tax on the issue of certificates of stock corporations.

SECTION 1. It shall be lawful for the secretary of every corporation in the state of California to demand and receive of any person requiring the issue to him of any certificate of stock in such corporation, a fee of ten cents in coin for each certificate, whether such certificate be the original issue or an issue on transfer, and such certificate shall not be delivered by the secretary until such fee shall be paid.

SEC. 2. It shall be the duty of the secretary of every such corporation, on the first Monday in January, April, July, and October, of each year, to make returns, under oath, to the tax collector, or officer acting as tax collector, of the number of certificates issued by the corporation of which he is secretary, during the quarter preceding, and pay to such tax collector the sum of ten cents in coin for each and every certificate so issued by said corporation, except that in the city and county of San Francisco such returns and payments shall be made to the license collector, or officer engaged in the collection of licenses in said city and county.

SEC. 3. Such tax collector, or license collector, is hereby authorized and empowered to examine such secretary, under oath, as to the truth of said returns, and to examine, if necessary, the books of such corporation, so far as they relate to the transfer of stock, or issue of certificates, and if the returns are not correct, then he is authorized to commence an action against such corporation in any court of competent jurisdiction, in the name of the people of the state of California, for a penalty of one hundred dollars for each certificate issued by such corporation and not so returned under oath, and several penalties may be joined in such action.

SEC. 4. Any person violating the provisions of section two of this act shall be deemed guilty of a misdemeanor, and false swearing to any return provided in section two, shall be deemed perjury.

SEC. 5. All moneys collected under the provisions of this act shall be paid by such tax collector, or license collector, into the county treasury, and shall become a part of the general fund, or if there shall in any county be no general fund, then the same shall become a part of such fund as the board of supervisors may direct. [Approved April 1, 1878. Took effect first Monday of April. Stats. 1877-8, p. 955.]

An Act to create the office of Commissioner of Transportation, and to define its powers and duties; to fix the maximum charges for transporting passengers and freights on certain railroads, and to prevent extortion and unjust discrimination thereon.

CHAPTER TWO.—EXTORTIONS, DISCRIMINATIONS, FORFEITURES, AND PENALTIES.

SECTION 1. A railroad company shall be deemed guilty of extortion in the following cases:

First—When it shall wilfully charge, demand, or receive from any passenger, as his fare from one station or place to another, any greater sum than is specified as the fare between such stations or places, for the same class of passage and in the same direction, in its tariff of fares on file with the commissioner of transportation.

Second—When it shall wilfully charge, demand, or receive from any person or persons, as the rate of freight on goods or merchandise, any greater sum than is specified as the rates for the like quantity of goods or merchandise of the same class, between the same places, and in the same direction, in its printed tariff of freights on file with said commissioner.

Third—When it shall wilfully charge, collect, or receive from any person or persons a greater amount of rate of toll, or compensation, than it shall at the same time charge, collect, or receive from any other persons for receiving, handling, storing, or delivering freight of the same class and like quantity at the same place.

Fourth—When it shall wilfully charge, demand, or receive from any person or persons any greater sum for passage or freight than from any other person or persons, between the same places, in the same direction, for the same class of passage, or for the like quantity of goods of the same class.

Fifth—When it shall wilfully charge, demand, or receive as compensation for receiving, storing, handling, or delivering, or for transporting any lot of goods or merchandise any greater sum than it shall, by or through any of its authorized agents, wherever situated, have agreed to charge for such services previously to the performance thereof.

SEC. 2. A railroad company shall be deemed guilty of unjust discrimination in the following cases:

First—When it shall directly or indirectly wilfully charge, demand, or receive from any person or persons any less sum for passage or freight than from any other person or persons (except as in this act herein provided), at the same time, between the same places, and the same direction, for the like class of passage, or for the like quantity of goods of the same class.

Second—When it shall directly or indirectly wilfully charge,

demand, or receive from any person or persons, as compensation for receiving, handling, storing, or delivering any lot of goods or merchandise, any less sum than it shall charge, collect, or receive from any other person for the like service, to a like quantity of goods of the same class, at the same place.

SEC. 3. It shall be unlawful for any such railroad company to grant free passes for travel within this state, except to the following persons:

First—Directors, officers, agents, and employees of the company, and their families.

Second—Officers and agents, and railroad contractors of other railroads, and telegraph, express, stage, and steamboat or steamship companies.

Third—Destitute persons.

Fourth—The commissioner of transportation, and his secretary and employees, when traveling in the discharge of their official duties.

Fifth—Public messengers, troops, and other persons who are, under existing laws, or any contract of such railroad company with this state, to be transported free of charge.

Every such railroad company shall keep a record of all free passes issued by it, except such as are issued by it to officers, agents, employees, and their families, and of the several classes thereof, and of the number of times each pass shall be used, and shall report the same to the commissioner of transportation whenever required.

SEC. 4. If any such railroad company shall be guilty of extortion, as defined in section one of this chapter, it shall forfeit and pay to the person or persons aggrieved three times the amount of the damages sustained by him or them, together with the costs of suit, to be recovered in any court of competent jurisdiction.

SEC. 5. If any such railroad company shall be guilty of unjust discrimination, as defined in section two of this chapter, it shall forfeit and pay the sum of one thousand dollars for each offense.

SEC. 6. If any such railroad company issues free passes to any person or persons other than those specified in section three of this chapter, or if any such company or any of its conductors shall permit any person whatever to travel free upon its cars, except upon the exhibition of free passes issued as provided in said section, such company or conductor shall forfeit and pay, for each offense, the sum of one hundred dollars.

SEC. 7. If any such railroad company refuses or neglects to comply with the award of the commissioners, provided in section five of chapter one of this act, it shall forfeit the sum of one hundred dollars per day from the time designated by the

commissioner for the completion of the work required until such work shall be actually completed.

SEC. 8. If any such railroad corporation neglects or refuses to file its tariff of freights and fares, as provided in section six, or to make its annual report, as provided in section seven of chapter one of this act, it shall forfeit not less than one hundred nor more than one thousand dollars per day for each and every day of such neglect or refusal.

SEC. 9. Any person aggrieved thereby, who may be unable to obtain satisfaction from the proper officers of any railroad in this state, may report to the commissioner of transportation any violations of the provisions of this act by any railroad company doing business therein, or by any of its officers, agents, or employees, and it shall be the duty of the commissioner to make a prompt investigation of such charges.

SEC. 10. Whenever it shall come to the knowledge of the commissioner that the provisions of this act have been violated by any railroad company, and the facts in his judgment warrant a prosecution therefor, he shall immediately give notice thereof to the district attorney of the county in which such violation occurred, and it is hereby made the duty of such district attorney to commence and prosecute, in a court of competent jurisdiction, an action against any railroad company that shall have been guilty of such violation.

SEC. 11. All fines, forfeitures, and penalties for violations of the provisions of this act herein provided shall be recovered by action in the name of the people of the state of California. Such action shall be brought and prosecuted upon complaint of the commissioner, or the person aggrieved, by the district attorney of the county in which such violation occurred; and all moneys paid or recovered on account of such fines, penalties, and forfeitures, shall be paid into the state treasury for the benefit of the public school. It is hereby made the duty of the attorney-general to counsel, advise, and assist the commissioner of transportation, whenever he shall be requested by him so to do, concerning any and all actions, proceedings, matters, things, powers, liabilities, and duties arising under the provisions of this act. He may also institute and prosecute any action or proceeding which may be necessary the more effectually to carry out the provisions of this act, and he may any at time take control of or assist in the prosecution of any action or proceeding commenced by any district attorney, as herein provided, whenever in his judgment the public interest will be subserved thereby.

CHAPTER THREE.—POLICE REGULATIONS.

SECTION 1. In forming a train on any railroad no freight, merchandise, or lumber cars shall be placed in the rear of pas-

senger cars, and if they or any of them shall be so placed, the officer or agent who so directed, or who knowingly suffered such arrangement of cars, and the conductor of the train, shall be guilty of a misdemeanor, and shall be punished accordingly.

SEC. 2. No company operating any railroad in this state shall, in carrying and transporting cattle, sheep, or swine, in car load lots confine the same in cars for a longer period than thirty-six consecutive hours, without unloading for rest, water, and feeding, for a period of at least ten consecutive hours. In estimating such time of confinement, the period during which the animals have been confined without such rest on connecting roads from which they are received shall be computed. In case the owner or person in charge of such animals refuses or neglects to pay for the care and feed of animals so rested, the railroad company may charge the expense thereof to the owner or consignee, and retain a lien upon the animals therefor until the same is paid.

SEC. 3. When any freight train on any railroad shall stop in such a position as to obstruct the ordinary travel on any highway, for a longer period than ten minutes, the person having charge of such train shall cause it to be separated, so as to leave one street or highway open to its full width to accommodate the public travel; and any railroad company in whose employment any person shall be, who shall violate this section, shall forfeit and pay the sum of twenty-five dollars for each offense.

SEC. 4. Whoever enters upon or crosses any railroad, at any private passway, which is inclosed by bars or gates, and neglects to leave the same securely closed after him, shall be guilty of a misdemeanor.

SEC. 5. Whoever shall lead, ride, drive, or conduct any beast along the track of a railroad, except where the railroad is built within the limits of the public highway, or who shall place, or having the right to prevent it, shall suffer any animal to be placed within the fences thereof for grazing or other purposes, shall be guilty of a misdemeanor.

SEC. 6. Any person who may be employed upon the railroad of any company in this state as engineer, conductor, baggage-master, brakeman, switchman, fireman, bridge-tender, flagman, or signalman, or who may have charge of the regulation or running of trains upon said railroad in any manner whatever, and who shall become or be intoxicated while engaged in the discharge of his duties, shall be guilty of a misdemeanor, and on conviction thereof, shall be punished for each offense by a fine not exceeding five hundred dollars, or by imprisonment in a county jail for a term not exceeding six months, or both, in the discretion of the court having cognizance of the offense; and if any person so employed as afore-

said, by reason of such intoxication, shall do any act, or neglect any duty, which act or neglect shall cause the death of, or bodily injury to any person or persons, he shall be deemed guilty of a felony.

SEC. 7. The governor may, from time to time, upon the application of any railroad or steamboat company, commission during his pleasure, one or more persons designated by such company, who, having been duly sworn, may act at its expense as policemen, with the powers of a deputy sheriff, upon the premises used by it in its business, or upon its cars or vessels. The company designating such person shall be responsible civilly for any abuse of his authority.

SEC. 8. Every such policeman shall, when on duty, wear in plain view a shield bearing the words "railroad police" or "steamboat police," as the case may be, and the name of the company for which he is commissioned.

SEC. 9. Every person who shall fraudulently evade or attempt to evade the payment of his fare for traveling on any railroad shall be fined not less than five nor more than twenty dollars.

SEC. 10. An act entitled "an act to provide for the appointment of commissioners of transportation, to fix the maximum charges for freights and fares, and to prevent extortion and discrimination on railroads in this state," approved April third, eighteen hundred and seventy-six, is hereby repealed, and all other acts and parts of acts in conflict with the provisions of this act are hereby repealed, so far as they conflict herewith. [In effect April 1, 1878. Stats. 1877-8, pp. 982-86.]

An Act to protect public health from infection caused by exhumation and removal of the remains of deceased persons.

SECTION 1. It shall be unlawful to disinter or exhume from a grave, vault, or other burial place, the body or remains of any deceased person, unless the person or persons so doing shall first obtain, from the board of health, health officer, mayor, or other head of the municipal government of the city, town, or city and county where the same are deposited, a permit for said purpose. Nor shall such body or remains disinterred, exhumed, or taken from any grave, vault, or other place of burial or deposit, be removed or transported in or through the streets or highways of any city, town, or city and county, unless the person or persons removing or transporting such body or remains shall first obtain, from the board of health or health officer (if such board or officer there be), and from the mayor or other head of the municipal government of the city or town, or city and county, a permit in writing, so to remove or transport such body or remains in and through such streets and highways.

SEC. 2. Permits to disinter or exhume the bodies or remains of deceased persons, as in the last section, may be granted, provided the person applying therefor shall produce a certificate from the coroner, the physician who attended such deceased person, or other physician in good standing cognizant of the facts, which certificate shall state the cause of death or disease of which the person died, and also the age and sex of such deceased; *and provided, further*, that the body or remains of deceased shall be inclosed in a metallic case or coffin, sealed in such manner as to prevent, as far as practicable, any noxious or offensive odor or effluvia escaping therefrom, and that such case or coffin contains the body or remains of but one person, except where infant children, of the same parent or parents, or parent and children are contained in such case or coffin. And the permit shall contain the above conditions and the words "permit to remove and transport the body of — — —, age — —, sex — —," and the name, age, and sex shall be written therein. The officer of the municipal government of the city or town, or city and county, granting such permit, shall require to be paid for each permit the sum of ten dollars, to be kept as a separate fund by the treasurer, and which shall be used in defraying expenses of and in respect to such permits, and for the inspection of the metallic cases, coffins, and inclosing boxes herein required; and an account of such moneys shall be embraced in the accounts and statements of the treasurer having the custody thereof.

SEC. 3. Any person or persons who shall disinter, exhume, or remove, or cause to be disinterred, exhumed, or removed from a grave, vault, or other receptacle or burial place, the body or remains of a deceased person, without a permit therefor, shall be guilty of a misdemeanor, and be punished by fine not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than thirty days, nor more than six months, or by both such fine and imprisonment. Nor shall it be lawful to receive such body, bones, or remains on any vehicle, car, barge, boat, ship, steamship, steamboat, or vessel, for transportation in or from this state, unless the permit to transport the same is first received, and is retained in evidence by the owner, driver, agent, superintendent, or master of the vehicle, car, or vessel.

SEC. 4. Any person or persons who shall move or transport, or caused to be moved or transported, on or through the streets or highways of any city or town, or city and county, of this state, the body or remains of a deceased person, which shall have been disinterred or exhumed without a permit, as described in section two of this act, shall be guilty of a misdemeanor, and be punishable as provided in section three of this act.

SEC. 5. Any person who shall give information to secure the conviction of any person or persons for the violation of the provisions of this act, shall be entitled to receive the sum of twenty-five dollars, to be paid from the fund collected from fines imposed and accruing under this act.

SEC. 6. Nothing in this act contained shall be taken to apply to the removal of the remains of deceased persons from one place of interment to another cemetery or place of interment within the same county; *provided*, that no permit shall be issued for the disinterment or removal of any body unless such body has been buried for two years. [Approved April 1, 1878. In effect thirty days after passage. Stats. 1877-8, p. 1050.]

An Act to promote emigration from the state of California.

SECTION 1. It shall be unlawful for the owners, officers, agents, or employees of any steamship company, sailing vessel, or railroad company, or firm, or corporation that may be engaged in this state in the transportation of passengers to and from any foreign port, to withhold or refuse any person or persons the right to purchase a passage ticket or tickets to any foreign country, for the reason that he or they have not presented a certificate, card, or other document whatsoever, showing that such person has paid in full, or in part, any or all dues, debts or demands, or otherwise, or any sum whatsoever, to any society, company, corporation, association, or individual, or firm; and any person or corporation who shall violate the provisions of this section, or in pursuance of any agreement, oral or written, refuse to sell a passage ticket to any person to any foreign country, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five hundred dollars; *provided*, that nothing in this section shall be construed in any manner to apply to any passport or other document required by law to be presented, having the signature or seal of any foreign consul resident within this state. [In effect March 26, 1880. Stats. 1880, p. 15, Ban. Ed. 50.]

An Act concerning the payment of the expenses and costs of the trial of convicts for crimes committed in the state prison, and to pay the costs of the trial of escaped convicts, and to pay for the expenses of Coroner inquests in said prison.

SECTION 1. The costs and expenses of all trials which have heretofore been had in the county in this state where the state prison is situated, for any crime committed by any convict in the state prison, and the costs of guarding and keeping such convict, and the execution of the sentence of said convict by said county, and the costs and expenses of all trials heretofore

had for the escape of any convict from the state prison, and the costs and expenses of all coroner inquests heretofore had of any convict at the state prison by the county where said prison has been situated, shall be certified to by the county clerk of said county wherein said trials and inquests have been held to the board of state prison directors for their approval, and after such approval they shall pay the same out of the money appropriated for the support of the state prison to the county treasurer of said county where said trials have been had; *provided*, that this act shall not apply to any costs or expenses incurred since January first, eighteen hundred and seventy-three."

SEC. 2. This act shall only apply to cases which have not been settled for by the state. [In effect April 12, 1880. Stats. 1880, p. 43, Ban. Ed. 204.]

An Act in relation to the intoxication of officers.

SECTION 1. Any officer of a town, village, city, county, or state, who shall be intoxicated while in discharge of the duties of his office, or by reason of intoxication is disqualified for the discharge of, or neglects his duties, shall be guilty of a misdemeanor, and on conviction of such misdemeanor shall forfeit his office; and in such case the vacancy occasioned thereby shall be filled in the same manner as if such officer had filed his resignation in the proper office, and it had been accepted by the proper authority; *provided*, such acceptance shall have been necessary to make the office vacant. [In effect April 15, 1880. Stats. 1880, p. 77, Ban. Ed. 265.]

An Act to prohibit the sale of intoxicating liquors in the state capitol building.

SECTION 1. Any person or persons having in charge or control the state capitol building, and allowing the same, or any portion thereof, to be used for the sale or distribution in any manner, for profit, of any malt or spirituous liquors, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not less than one thousand dollars. [In effect April 16, 1880. Stats. 1880, p. 80, Ban. Ed. 273.]

An Act to regulate and provide for a day of rest in certain cases.

SECTION 1. It shall be unlawful for any person engaged in the business of baking to engage, or permit others in his employ to engage in the labor of baking, for the purpose of sale, between the hours of six o'clock P. M. on Saturday and six o'clock P. M. on Sunday, except in the setting of sponge preparatory to the night's work; *provided, however*, that restaurants, hotels, and boarding houses may do such baking as is necessary for their own consumption.

SEC. 2. Any person violating the provisions of this act shall be guilty of a misdemeanor, and shall be punishable by imprisonment in the county jail not less than one month nor more than six months, or by a fine of not less than twenty-five dollars nor more than two hundred dollars, or by both fine and imprisonment. [In effect April 16, 1880. Stats. 1880, p. 80, Ban. Ed. 311.]

An Act for the protection of certain kinds of fish.

SECTION 1. From and after the passage of this act, and until the first day of July, A.D. eighteen hundred and eighty-two, it shall be unlawful for any person to catch any catfish in any of the public waters of this state, except by means of a hook and line.

SEC. 2. Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished as follows: For the first offense, by a fine of not less than fifty dollars, or imprisonment in the county jail for not less than fifty days, or both such fine and imprisonment; for the second, and each subsequent offense, by a fine of not less than two hundred and fifty dollars, or by imprisonment in county jail for a period of not less than two hundred and fifty days, or both such fine and imprisonment.

SEC. 3. Any person giving information which leads to the conviction of any person or persons for violating the provisions of this act shall, upon the conviction of such person or persons, be entitled to receive one-half of the fine imposed upon such person or persons. [In effect April 16, 1880. Stats. 1880, p. 106, Ban. Ed. 345.]

An Act to provide for the construction, maintenance and regulation of fishways in streams naturally frequented by salmon, shad and other migratory fish.

SECTION 1. It shall be the duty of the state board of fish commissioners to examine, from time to time, all dams and artificial obstructions in all rivers or streams in this state, naturally frequented by salmon, shad, or other migratory fish, and if, in their opinion, there is not free passage for fish over or around any dam or artificial obstruction, to notify the owners or occupants thereof to provide the same within a specified time with a durable and efficient fishway of such form and capacity and in such location as shall be determined by the fish commissioners, or person authorized by them. If such fishway is not completed to the satisfaction of said commissioners within the time specified, the owners or occupants of such dam or artificial obstruction shall be deemed guilty of a misdemeanor, and may be prosecuted by action on complaint

before any justice's court or justice of the peace in the county where such dam or artificial obstruction is situated, and, on conviction, shall be fined two hundred and fifty dollars, and the plaintiff shall recover full costs; and one-half of such fine shall be for the benefit of and shall be paid to the person making the complaint, and the other half shall be paid into the state treasury for the benefit of the fund for "preservation and restoration of fish," and may be expended by the state board of fish commissioners, in their discretion, for the construction and maintenance of fishways.

SEC. 2. It shall be incumbent upon the owners or occupants of all dams or artificial obstructions, where the state board of fish commissioners require such fishways to be provided, to keep the same in repair, and open, and free from obstructions to the passage of fish at all times; and any owners or occupants of any such dam or artificial obstruction who neglects or refuses to keep such fishway in repair, and open, and free from obstruction to the passage of fish, shall be guilty of a misdemeanor, and subject to the same fine, and which shall be recovered in the same manner, and applied to the same purposes, as provided in section one of this act.

SEC. 3. Any person who shall willfully or knowingly destroy, injure or obstruct any such fishway, or any person who shall at any time take or catch any salmon, shad, or other migratory fish or trout, except by hook and line, within three hundred feet of any fishway required by the state board of fish commissioners to be provided and kept open, or shall take or catch any such fish in any manner, within fifty feet of such fishway, shall be guilty of a misdemeanor, and subject to the same fine, and which shall be recovered in the same manner and applied to the same purposes as provided in section one of this act. [In effect April 16, 1830. Stats. 1830, p. 121, Ban. Ed. 387.]

An Act relating to fishing in the waters of this state.

SECTION 1. All aliens incapable of becoming electors of this state are hereby prohibited from fishing, or taking any fish, lobster, shrimps, or shell fish of any kind, for the purpose of selling, or giving to another person to sell. Every violation of the provisions of this act shall be a misdemeanor, punishable upon conviction by a fine of not less than twenty-five dollars, or by imprisonment in the county jail for a period of not less than thirty days. [In effect April 23, 1880. Stats. 1880, p. 123, Ban. Ed. 383.]

An Act to regulate the sale of certain poisonous substances.

[Approved April 16, 1880.]

SECTION 1. It shall be unlawful for any person to retail any of the substances poisonous, and by reason thereof dangerous to human life, without distinctly labeling the bottle, box, vessel, or package, and the wrapper or cover thereof in which such substance is contained, with the common or usual name thereof, together with the word "poison," and the name and place of business of the seller. Nor shall it be lawful for any person to retail any of the substances enumerated in either of said schedules to any person, unless, on due inquiry, it is found that the person receiving the same is aware of its poisonous character, and that it is to be used for a legitimate purpose.

SEC. 2. It shall be unlawful for any person to retail any of the substances enumerated herein, unless, before delivering the same, such person shall make, or cause to be made, in a book kept for that purpose only, an entry stating the date of the sale, the name and address of the purchaser, the name and quantity of the substance sold, the purpose for which it is stated by the purchaser to be required, and the name of the dispenser. The book required by this Act shall be always open to inspection by the proper authorities. It shall also be the duty of the person dispensing any of the substances enumerated in either of said schedules to ascertain, by due inquiry, whether the name and address given by the person receiving the same are his true name and address, and for that purpose may require such person to be identified.

SEC. 3. Any person who shall dispense any of the substances enumerated in either of said schedules without complying with the regulations herein prescribed, shall, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment; *provided*, that nothing in this Act shall be so construed as to apply to the prescriptions of any physician authorized to practice medicine under the laws of this State.

SEC. 4. This Act shall take effect and be in force from and after June first, eighteen hundred and eighty.

SCHEDULE "A."

Arsenic, corrosive sublimate, hydrocyanic acid, cyanite of potassium, strychnia, essential oil of bitter almonds, opium, aconite, belladonna, conium, nux vomica, henbane, tansy,

savin, ergot, cotton root, digitalis, chloroform, chloral hydrate, and all preparations, compounds, salts, extracts, or tinctures of such substances, except preparations of opium containing less than two grains to the fluid ounce.

SCHEDULE "B."

White precipitate, red precipitate, red and green iodides of mercury, colchicum, cantharides, oxalic acid, croton oil, sulphate of zinc, sugar of lead, carbolic acid, sulphuric acid, muriatic acid, nitric acid, phosphorus, and all preparations, compounds, salts, extracts, or tinctures of such substances. [Approved April 16, 1880. Stats. 1880, p. 102, Ban. Ed. 341.]

An Act to prohibit the issuance of licenses to aliens not eligible to become electors of the State of California.

[Approved April 12, 1880.]

SECTION 1. No license to transact any business or occupation shall be granted or issued by the State, or any county, or city, or city and county, or town, or any municipal corporation, to any alien not eligible to become an elector of this State.

SEC. 2. A violation of the provisions of section one of this Act shall be deemed a misdemeanor, and be punished accordingly. [Stats 1880, p. 39, Ban. Ed. 141.]

THE PEOPLE v. QUONG ON LONG.

SEPULVEDA J.:

* * * * It results that the Act in question, intended as a prohibition directed against the Chinese, must fall to the ground, and be considered void, because it violates the treaty of the nation and the Constitution of the United States, the supreme law of the land. "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." [Art. VI. Sec. 9, Constitution of the United States.]

The defendant must pay a license, as prescribed by section 3381 of the Political Code; and he cannot shield himself with the Act of the State Legislature for the reasons above set forth. [6 Pac. C. L. J., p. 118.]

An Act to define, regulate and govern the state prisons of California.

SECTION 1. The prison heretofore known as the "branch state prison" shall be known hereafter and designated as the "state prison at Folsom," and all its finances and other accounts shall be kept separate from those of the state prison at San Quentin, and it shall have an official staff conformable to the laws of the state in relation to state prisons; and it shall be lawful for courts to sentence convicts to the state prison at San Quentin, or to the state prison at Folsom, in their discretion, and the board of directors shall have power to transfer prisoners from either prison to the other one, when, in their judgment, such transfer is for the best interests of the state.

SEC. 2. For the government and management of the California state prisons there shall be appointed by the governor, by and with the advice and consent of the senate, on or before the second Monday in January A.D. eighteen hundred and eighty, five directors, who shall hold their office for the term of ten years from and after said second Monday in January, A.D. eighteen hundred and eighty, and until their successors are appointed and qualified; *provided*, that said directors so appointed shall, at their first meeting after the passage of this act, so classify themselves by lot, that one of them shall go out of office in two years, one of them in four years, one of them in six years, one of them in eight years, and one of them in ten years after said second Monday in January, A.D. eighteen hundred and eighty; and an entry of such classification shall be made in the minutes of said directors, signed by them, and a duplicate thereof shall be filed in the office of the secretary of state. And on or before the second Monday in January, A.D. eighteen and eighty-two, and at the same time biennially thereafter, the governor shall appoint, by and with the advice and consent of the senate, one director, whose term of office shall be for a period of ten years, commencing with said second Monday in January. And each director shall subscribe an oath of office, which shall be indorsed on his commission.

SEC. 3. At the first meeting of the directors after the passage of this act, and at their meeting in January, biennially thereafter, they shall elect one of their number president of the board.

SEC. 4. A majority of the board shall constitute a quorum for the transaction of business, but no order of the board shall be valid unless it is entered on the journal, and is concurred in by three members.

SEC. 5. It shall be the duty of the directors:

First—To determine the necessary officers of the prisons, other than those of wardens and clerks, specifying their duties severally, and fixing their salaries; to prescribe rules and reg-

ulations for the government of the prisons, and to revise and change the same from time to time as circumstances may require; *provided*, the warden may make such temporary rules and orders as he may deem proper, to be in force until the next meeting of the board. At least three of said directors shall visit the prison in company on the first Tuesday in each month, or as soon thereafter as may be practicable, and examine all the different departments, and audit all claims against the prisons. The directors shall cause an inspection of the prisons to be made by one of their number at least once in each month.

Second—The directors shall meet at the state prisons within the first ten days in January, April, July, and October of each year, and, in addition to the duties above described, they shall examine the books and accounts of the wardens and clerks.

Third—To enter on their journal the result of all examinations, and of all other official acts, which shall be signed by the members present.

Fourth—On or before the first day of November, A.D. eighteen hundred and eighty, and annually thereafter, to report to the governor the condition of the prisons, together with a detailed statement of their receipts and expenditures, and such suggestions as their interests may require.

SEC. 6. The board of directors shall have power to establish an office in San Francisco, and employ a secretary.

SEC. 7. The directors shall appoint a warden for each prison, who shall take and subscribe an oath or affirmation faithfully to discharge the duties of his office, and enter into a bond to the state of California in the sum of twenty-five thousand dollars, with two or more sureties, to be approved by the directors and the attorney-general of the state, conditioned for the faithful performance of the duties which may devolve upon him as such officer, and he shall hold his office for four years.

SEC. 8. The wardens shall reside at the state prisons to which they are respectively assigned, in houses provided and furnished at the expense of the state; and it shall be their duty:

First—To fill all subordinate positions that may be created by order of the board of directors, by appointment of suitable persons thereto.

Second—To supervise the government, discipline, and police of the prison.

Third—To give all needful directions to the inferior officers, and secure from each a faithful discharge of their several duties.

Fourth—To make frequent examinations into the state of the prisons, the health, condition, and safety of the convicts.

Fifth—To report as often as they may be required to the directors, the number of guards employed, their names and duties, and such other matters as may be required.

Sixth—To have general charge of all departments of the prisons, and of the officers.

Seventh—To bring any and all suits at law or in equity arising in his department that may be necessary to protect the rights of the state in matters connected with the prisons and their management, in the name of the board of state prison directors, and to prosecute the same with the consent of the board of directors.

SEC. 9. The board of directors shall appoint a clerk for each prison, who shall take an oath of office, and enter into a bond to the state, with sureties satisfactory to the board, in the sum of five thousand dollars, that they will faithfully discharge the duties which devolve upon them. The clerks shall hold their office for the period of four years, unless sooner removed by the board for misconduct, incompetency, or neglect of duty.

SEC. 10. The clerks shall keep the accounts of the prisons to which they are severally appointed in such manner as to exhibit clearly all its financial transactions. A register of convicts shall be kept, in which shall be entered the name of each convict, the crime of which he is convicted, the period of his sentence, from what county, by what court sentenced, his nativity, to what degree educated, at what institution, and under what system; an accurate description of his person, and whether he has been previously confined in a state prison in this or any other state; and if so, when and how he was discharged. The clerks shall also act as secretaries of the board while in session at the prisons.

SEC. 11. The board of directors are hereby authorized and required to contract for provisions, clothing, medicines, forage, fuel, and all other supplies needed for the support of the prisons for any period of time not exceeding one year, and such contracts shall be limited to bona fide dealers in the several classes of articles contracted for; such contracts shall be given to the lowest bidder, at a public letting thereof, if the price bid is a fair and reasonable one, and not greater than the usual market value and prices. Each bid shall be accompanied by such security as the board may require, conditioned upon the bidder entering into a contract upon the terms of his bid, on notice of the acceptance thereof, and furnishing a penal bond, with good and sufficient sureties, in such sum as the board may direct, and to their satisfaction, that he will faithfully perform his contract. Notice of the time, place, and conditions of the letting of each contract shall be given for at least two consecutive weeks in two daily newspapers

printed and published in the city of San Francisco, and in one newspaper printed and published in the city of Sacramento, and in one newspaper printed and published in the county where the prison is situated. If all the bids made at such letting are deemed unreasonably high, the board may, in their discretion, decline to contract, and may again advertise for proposals, and may so continue to renew the advertisement until satisfactory contracts are made, and in the meantime the board may contract with any one whose offer is regarded just and equitable; but no contract thus made shall run more than sixty days, nor in any case extend beyond the public letting. No bid shall be accepted, nor a contract entered into in pursuance thereof, when such bid is higher than any other bid at the same letting for the same class or schedule of articles, and when a contract can be had at such lower bid. When two or more bids for the same article or articles are equal in amount, the board may select the one which, all things considered, may by them be thought best for the interests of the state; or they may divide the contract between the bidders, as in their judgment may seem proper and right. [In effect March 14, 1881.]

SEC. 12. The board of directors shall have power, in their discretion, to purchase any clay lands suitable for brick-making that may lie contiguous to the San Quentin prison grounds, not to exceed in value the sum of fifteen thousand dollars.

SEC. 13. No person shall be appointed to any office, or be employed in the prisons on behalf of the state, who is a contractor, or the agent or employee of a contractor, or who is interested directly or indirectly in any business carried on therein; and no male person who is not a qualified elector of the state of California shall be appointed by the wardens to any office in or about the prisons, nor shall any one be employed or appointed by virtue of this act who is in the habit of intemperate use of intoxicating liquors. A single act of intoxication shall justify discharge or removal.

SEC. 14. The governor shall have the power to remove either of the directors for misconduct, incompetency, or neglect of duty, upon proper notice to him or them, accompanied by copies of written charges, he or they having an opportunity to be heard thereon.

SEC. 15. If the office of director shall become vacant by death, resignation, removal by the governor, or any other cause, the vacancy shall be filled for the unexpired term by the governor, by and with the advice and consent of the senate.

SEC. 16. The wardens and clerks may be removed by the board of directors at any time for misconduct, incompetency, or neglect of duty; and all other officers and employees may be removed at any time at the pleasure of the warden.

SEC. 17. The directors shall receive no compensation, other than ten cents per mile for traveling expenses, and one hundred dollars (\$100) per month for other expenses incurred while engaged in the performance of official duties. The warden shall receive a salary not less than two thousand and four hundred dollars (\$2400), and not to exceed three thousand dollars (\$3000) per annum, in the discretion of the directors. The clerks shall receive one thousand and five hundred dollars (\$1500) per annum; and all other officers and employees shall receive such compensation as the board of directors shall deem just and equitable in each case. [In effect March 14, 1881.]

SEC. 18. All moneys received or collected by the wardens, by virtue of this act, shall be paid by them into the state treasury, to the credit of a fund to be known as the state prison fund, at least as often as once per month, excepting so much thereof as may be necessary to pay the current expenses. The wardens shall require vouchers for all moneys by them expended, and safely keep the same on file in their respective offices at the prisons, for all sums of money required to be paid other than for the uses above named, as well as for said uses. When there is not sufficient money in the hands of the wardens, drafts shall be drawn on the controller of state, signed by at least three of the state prison directors, and countersigned by the wardens, and the controller of state shall draw his warrant on the state treasurer, who shall pay the same out of any moneys belonging to the state prison fund, or appropriated for the use or support of the state prisons. [In effect March 14, 1881.]

SEC. 19. All revenues of the prisons, unless herein otherwise provided, shall be paid to the wardens, who alone are authorized to receipt for the same and discharge from liability. When any sum of money is paid to the wardens, they shall cause the same to be properly entered on the books by the clerks.

SEC. 20. On payment of any moneys into the state treasury, as provided in this act, the wardens and state treasurer shall report to the controller of state the amount so paid, and the state treasurer shall give the wardens a receipt therefor, which receipt shall be filed with the controller. The wardens shall report to the controller of state the amount of money paid into the said treasury by them during each month; and shall also report to said controller of state the amounts received and disbursed by them every three months, and during the period for which such report shall be made, which quarterly report shall be signed by the warden and at least three of the directors. [In effect March 14, 1881.]

SEC. 21. All convicts not employed on contracts may be employed by authority of the board of directors, under charge of the wardens and such skilled foremen as he may deem nec-

essary in the performance of work for the state, or in the manufacture of any article or articles which, in the opinion of the board, may inure to the best interests of the state; and the board of directors are hereby authorized to purchase, from time to time, such tools, machinery, and materials, and to direct the employment of such skilled foremen as may be necessary to carry out the provisions of this section, and to dispose of the articles manufactured and not needed by the state, for cash, at public auction or otherwise. If by auction, after having first given notice of such sale by advertising the time and place thereof, together with a list of the articles to be sold, in ten consecutive issues of two or more daily newspapers of general circulation published in the city and county of San Francisco. The money received from the sale of all articles so sold shall be paid into the state treasury, by the warden of the prison, to the credit of the fund of said prison.

SEC. 22. In the treatment of the prisoners the following general rules shall be observed: Each convict shall be provided with a bed of straw, or other suitable material, and sufficient covering of blankets, and shall be supplied with garments of coarse, substantial material, of distinctive manufacture, and with sufficient plain and wholesome food, of such variety as may be most conducive to good health.

Second—No punishment shall be inflicted, except by the order and under the direction of the wardens.

Third—The warden shall keep a correct account of all money and valuables upon the prisoner when delivered at the prison, and shall pay the amount, or the proceeds thereof, or return the same to the convict when discharged, or to his legal representatives in case of his death; and in case of the death of such convict without being released, if no legal representative shall demand such property within five years, the same shall be paid into the state prison fund.

Fourth—The rules and regulations prescribing the duties and obligations of the prisoners shall be printed and hung up in each cell and shop.

Fifth—Each convict, when he leaves the prison, shall be supplied with the money taken from him when he entered, and which he has not disposed of, together with any sum which may have been earned by him for his own account, allowed to him by the state for good conduct or diligent labor, or may have been presented to him from any source; and in case the prisoner has not funds sufficient for present purposes, he shall be furnished with five dollars in money, a suit of clothes costing not more than ten dollars, and a half-fare ticket to the place where sentenced, if the prisoner desires to return there, or to any other place of the same cost; and he shall be entitled, if he so elect, to immunity from having his

hair cut, or from being shaved, for three calendar months immediately prior to his discharge. It shall not be lawful for the officers of the prison to furnish, or permit to be furnished, to any one, for publication, the name of any prisoner about to be discharged. When the warden, and such other officers as may be designated by the directors to act with him in such cases, shall be of opinion that any convict is insane, they shall make proper examination, and if they remain of the opinion that such person is insane, the warden shall certify the fact to the superintendent of one of the state asylums for the insane, and shall forthwith send such convict to said asylum for care and treatment. It shall be the duty of the warden, also, to send to the directors a copy of such certificate, and thereafter a statement as to his subsequent acts regarding the said insane convict. And it shall be the duty of the superintendent of the insane asylum to receive such insane convict and keep him until cured. It shall be his duty, upon the receipt of such insane convict, to notify the directors of the fact, giving name, date, and wherefrom, and from whose hands received. When, in the opinion of the superintendent, such insane convict is cured of insanity, it shall be his duty to immediately notify the directors thereof; and it shall be his duty, also, to notify the warden of the prison from whence he was received, who shall immediately send for, take, and receive the said convict back into the prison, the time passed at the asylum counting as a part of such convict's sentence. Before discharging any convict who may be insane at the time of the expiration of his sentence, the warden shall first give notice, in writing, to a judge of the superior court of the county in which the state prison may be located, over which he has control, of the fact of such insanity; whereupon said Court shall forthwith make an order, and deliver the same to the sheriff of said county, commanding him to remove such insane convict and take him before said court. Upon the receipt of such order, it shall be the duty of said sheriff to whom it is directed to execute and return the same forthwith to the court by whom it was issued, and thereupon the said court shall cause proper examination to be made by medical experts, and if it shall satisfactorily appear that such convict is insane, said court shall order him to be confined in one of the insane asylums. The sheriff shall receive the same compensation as for transferring a prisoner to the state prison, and to be paid in the same manner. If any judge, after having been so notified by the warden, shall neglect to cause such order to be made as herein provided, or any such sheriff shall neglect to remove such insane convict, as required by the provisions of this section, it shall be the duty of the warden to cause such insane convict to be removed before a superior court of a county in which the state prison

is located, in charge of an officer of the prison, or other suitable person, for the purpose of examination; and the cost of such removal shall be paid out of the state treasury, in the same manner as when removed by the sheriff as herein provided.

SEC. 23. The board of state prison directors of this state shall require of every able-bodied convict confined in a state prison as many hours of faithful labor, in each and every day during his term of imprisonment, as shall be prescribed by the rules and regulations of the prison; and every convict faithfully performing such labor, and being in all respects obedient to the rules and regulations of the prison, or if unable to work, yet faithful and obedient, shall be allowed from his term, instead and in lieu of the credits heretofore allowed by law, a deduction of two months in each of the first two years, four months in each of the next two years, and five months in each of the remaining years of said term; *provided*, that any such convict who shall commit an assault upon his keeper, or any foreman, officer, or convict, or otherwise endanger life, or by any flagrant disregard of the rules of the prison, or any misdemeanor whatever, shall forfeit all deductions of time earned by him for good conduct before the commission of such offense; such forfeiture, however, shall only be made by the board of directors, after due proof of the offense, and notice to the offender; nor shall such forfeiture be imposed when a party has violated any rule or rules without violence or evil intent, of which the directors shall be the sole judges. The name of no convict who attempts to escape, after the passage of this act, shall be sent by the state prison officials to the governor for the credits herein provided.

SEC. 23. All criminals sentenced to the state prisons by the authority of the United States shall be received and kept according to the sentence of the court by which they were tried, and the prisoners so confined shall be subject, in all respects, to the same discipline and treatment as though committed under the laws of this state. The wardens are hereby authorized to charge and receive from the United States, for the use of the state, an amount sufficient for the support of each prisoner, the cost of all clothing that may be furnished, and one dollar per month for the use of the prisoner. No other or further charge shall be made by any officer for or on account of such prisoners.

SEC. 25. After the first day of January, eighteen hundred and eighty-two, the labor of convicts shall not be let out by contract to any person, copartnership, company, or corporation by the state board of prison directors, nor shall they let out any such labor prior to January first, eighteen hundred and eighty-two, by contract extending beyond such date; *provided*, that after the passage of this act, no skilled convict labor

shall be let or contracted out at a price less than one dollar per day for each convict; *provided further*, that this section shall not apply to contracts heretofore entered into.

SEC. 26. The board of directors shall have power to contract for the supply of gas and water for said prisons, upon such terms as said board shall deem to be for the best interest of the state, or to manufacture gas or furnish water themselves, at their option.

SEC. 27. No officer or employee shall receive, directly or indirectly, any compensation for his services other than that prescribed by the directors; nor shall he receive any compensation whatever, directly or indirectly, for any act or service which he may do or perform for or on behalf of any contractor, or agent, or employee of a contractor. For any violation of the provisions of this section, the officer, agent, or employee of the state shall be discharged from his office or service; and every contractor, or employee, or agent of a contractor engaged therein, shall be expelled from the prison grounds, and not again permitted within the same as a contractor, agent, or employee.

SEC. 28. No officer or employee of the state, or contractor or employee of a contractor, shall, without permission of the board of directors, make any gift or present to a convict, or receive any from a convict, or have any barter or dealings with a prisoner. For every violation of the provisions of this section the party engaged therein shall incur the same penalty as prescribed in section twenty-seven.

SEC. 29. No officer or employee of the prison shall be interested, directly or indirectly, in any contract or purchase made or authorized to be made by any one for or on behalf of the prisons.

SEC. 30. Repealed. [In effect March 14, 1881.]

SEC. 31. There shall be printed annually, for the use of the prisons, five hundred copies of the annual report of the board of directors, and the clerk shall annually transmit to each of the state prisons in the United States one copy of such report.

SEC. 32. All the bonds of officers and employees under this act shall be deposited with the secretary of state.

SEC. 33. If any of the shops or buildings in which convicts are employed are destroyed in any way, or injured by fire, or otherwise, they may be rebuilt or repaired immediately, under the direction of the board of directors, by and with the advice and consent of the governor, attorney-general, and secretary of state, and the expenses thereof paid out of any funds in the state treasury not otherwise appropriated by law.

SEC. 34. The board of directors must report to the governor from time to time the names of any and all persons confined in the state prisons who, in their judgment, ought to

be pardoned out and set at liberty on account of good conduct, or unusual term of sentences, or any other cause, which, in their opinion, should entitle such prisoner to pardon.

SEC. 35. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. [In effect April 15, 1880. Stats. 1880, p. 67, Ban. Ed. 243. As amended by act of March 14, 1881.]

An Act to create an additional police judge's court for the city and county of San Francisco, to define its powers and jurisdiction.

SECTION 1. There is hereby created and established in and for the city and county of San Francisco an additional police judge's court, to be known and designated as the "police judge's court, number 2," which court shall have concurrent jurisdiction of all preliminary examinations of persons charged with felony, and of all misdemeanors and violations of city and county ordinances, and all other offenses of which the police judge's court of said city and county now has jurisdiction.

SEC. 2. There shall be, as far as practicable, an equal distribution of cases between the said courts, which cases shall be alternately set down for trial to each court in the order in which the warrants are issued.

SEC. 3. The mode of examination, trial, and procedure in the police judge's court number 2 shall in all cases be governed by the same rules prescribed by law for other police courts in similar cases.

SEC. 4. A judge of the police judge's court number 2 shall be elected at the same time and in a like manner as the police judge of the police judge's court of said city and county, and whose term of office shall be the same. The governor of the state of California shall, within thirty days after the passage of this act, appoint some suitable person as judge of the police judge's court number 2, who shall hold such office until his successor has been elected and qualified. The compensation of the judge of the police judge's court number 2 shall be four thousand dollars per annum, payable in the same manner as the salary of the police judge of said city and county is now paid.

SEC. 5. The said police judge's court number 2 shall hold its session in the city and county of San Francisco, in such central and convenient place as shall be provided for that purpose by the board of supervisors. The said board of supervisors shall also, within thirty days after the passage of this act, elect some suitable person as prosecuting attorney of the said police judge's court number 2, at the same salary per annum as is now paid to the prosecuting attorney of the police

judge's court of said city and county. And said board of supervisors shall elect a clerk of court, at a salary of one thousand eight hundred dollars per annum, payable in the same manner as the salaries of the judge and clerk of the police judge's court of said city and county are now paid.

SEC. 6. The judge of the police judge's court number 2 shall be a conservator of the peace in said city and county, and may exercise all the powers conferred by law upon the police judge as magistrate.

SEC. 7. The judge of said court shall appoint a suitable person to act as bailiff of said Court, who shall receive a like compensation for such services as is now paid to the bailiff of the police judge's court for said city and county. [In effect March 7, 1881.]

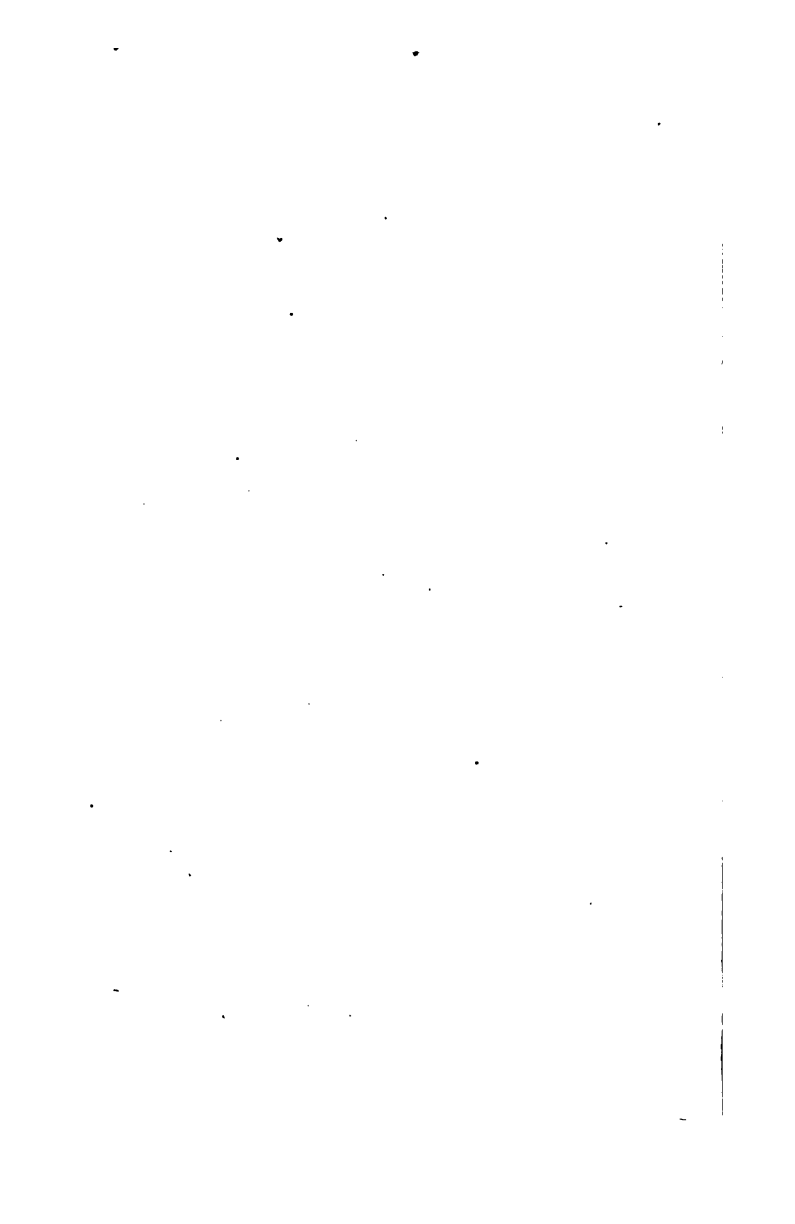
An Act to prevent fraud and deception in the manufacture and sale of butter and cheese.

SECTION 1. Whoever manufactures, sells, or offers for sale, or causes the same to be done, any substance purporting to be butter or cheese having the semblance of butter or cheese, which substance is not made wholly from pure cream or milk, unless the same be manufactured under its true and appropriate name, and unless each package, roll, or parcel of such substance, and each vessel, containing one or more packages of such substance has distinctly and durably painted, stamped, or marked thereon in English the true and appropriate name of such substance, in ordinary bold face capital letters, not less than five lines pica, shall be punished as provided in section three of this act.

SEC. 2. Whoever shall sell any such substance as is mentioned in section one of this act, or causes the same to be done without having on each package, roll, or parcel so sold a label attached thereto, on which is plainly and legibly printed in English in roman letters, the true and appropriate name of such substance, shall be punished as is provided in section three of this act.

SEC. 3. Whoever shall violate section one or section two of this act shall be guilty of a misdemeanor, and shall be fined in any sum not less than ten nor more than five hundred dollars, or imprisoned in the county jail not less than ten nor more than ninety days, or by both such fine and imprisonment, in the discretion of the court; *provided*, that nothing contained in this act shall be construed to prevent the use of skimmed milk, salt rennet, or harmless coloring matter in the manufacture of butter or cheese.

SEC. 4. All acts and parts of acts in conflict with the provisions of this act are hereby repealed. [In effect March, 2, 1881.]



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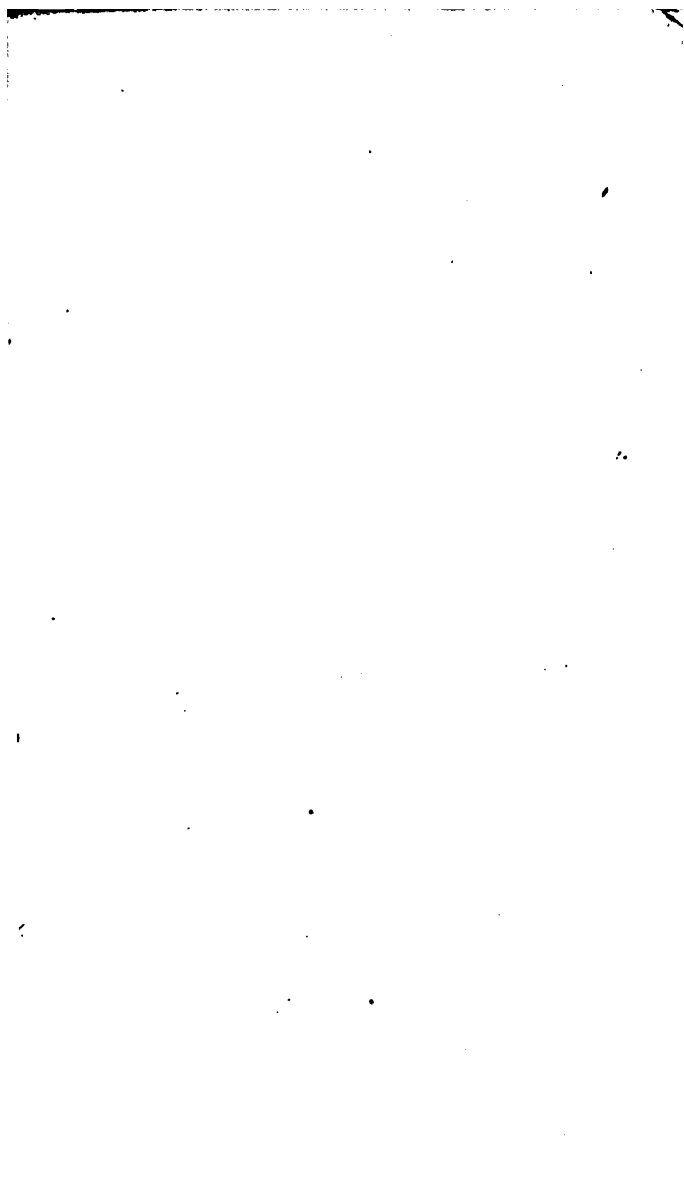
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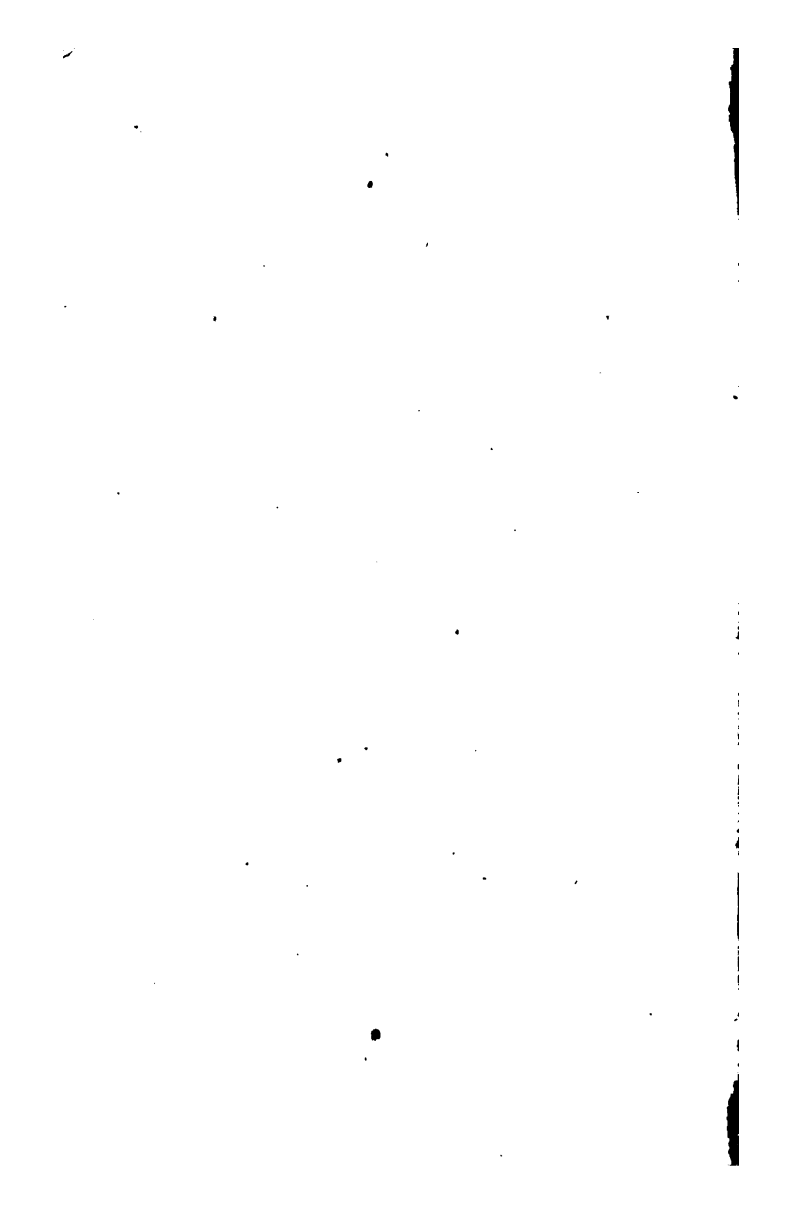
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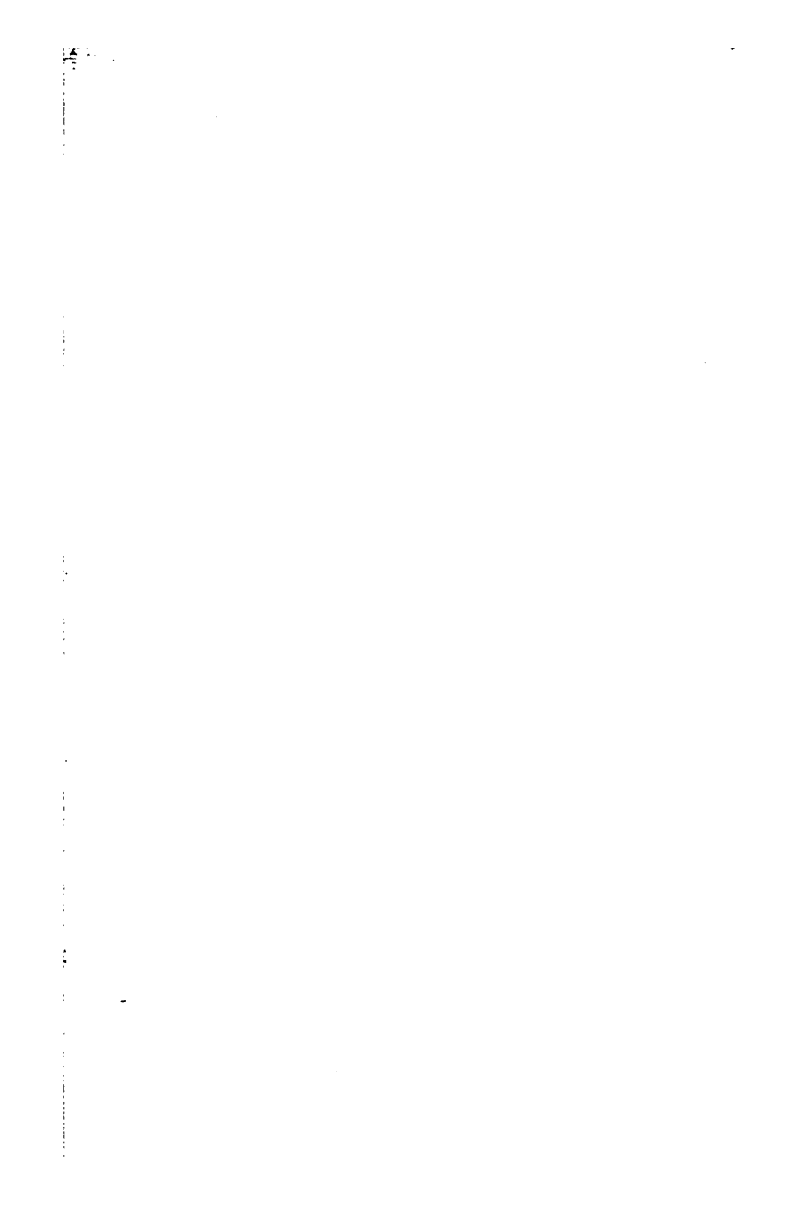
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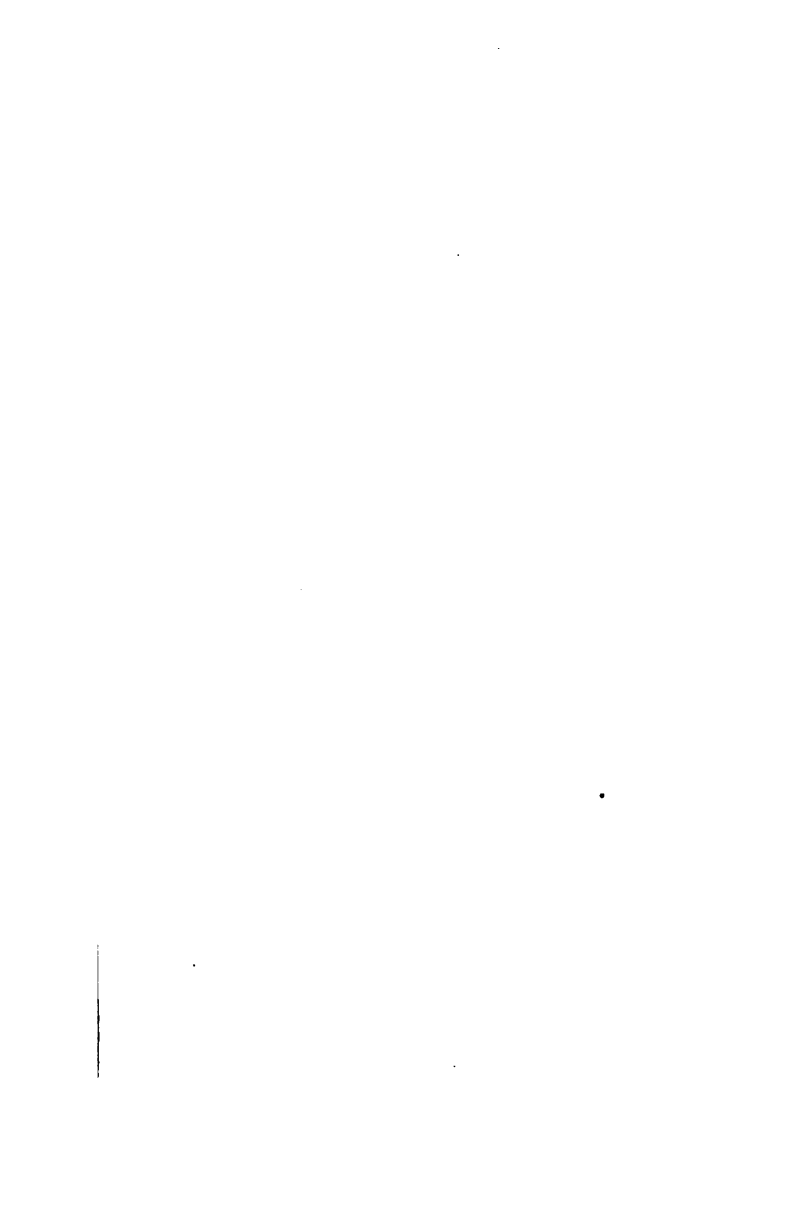














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